(25,252)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 969.

NORTHERN PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

EMMA A. WISMER, SUBSTITUTED FOR GEORGE F. WISMER, DECEASED.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Names and Addresses of Attorneys of Record.

EDWARD J. CANNON, Esquire, Old National Bank Building, Spokane, Washington,

CHARLES DONNELLY, Esquire, C/o Northern Pacific Railway Company, St. Paul, Minnesota,

Attorneys for Plaintiff and Plaintiff in Error.

and

FRANCIS A. GARRECHT, Esquire, United States Attorney, Federal Building, Spokane, Washington,

Attorney for Defendant and Defendant in Error. [2*]

In the Superior Court of the State of Washington, for the County of Stevens.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff,

vs.

GEORGE F. WISMER,

Defendant.

Complaint.

The plaintiff for its cause of action alleges:

I.

That plaintiff is a corporation organized under the laws of the State of Wisconsin and has duly complied with the laws of, and is authorized to do business in, the State of Washington.

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*Page-number appearing at foot of page of original certified Record.

II.

That by Act of Congress of July 2, 1864 (13 Stats. page 365), incorporating the Northern Pacific Railroad Company, there was granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of its railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty (20) alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten (10) alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, [3] or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said railroad is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office.

III.

That on October 4, 1880, the Northern Pacific Railroad Company definitely located that portion of its line of road from Spokane Falls to Wallula opposite the lands in controversy, and filed a plat thereof in the office of the Commissioner of the General Land Office.

IV.

That on November 13, 1880, the Commissioner of the General Land Office withdrew from the public domain all odd numbered sections within forty (40) miles of said line so definitely located, and transmitted his withdrawal order to the local land office at Colfax, Washington, which order was received and filed in said local land office November 30, 1880; Colfax, Washington, then being the local land office at which the public lands of the United States surrounding the lands in controversy were subject to entry.

Thereafter the Northern Pacific Railroad Company duly constructed its road on the line so definitely located, and that portion of its road opposite the lands in controversy, to wit, from Eight Mile Prairie to Wallula, was examined by Commissioners appointed by the President of the United States for that purpose, whose report was approved and said constructed road accepted by the President of the United States.

V.

That on July 2, 1864, and on October 4, 1880, the South half (S ½) of the Northwest quarter (NW ¼) of Section Thirteen (13), Township Twenty-eight (28) North, Range Thirty-nine (39) East, in the County of Stevens, in the State of Washington, [4] was public land of the United States, not mineral, within forty (40) miles of the line of the Northern Pacific Railroad as definitely located October 4, 1880, to which the United States had full title on both said dates, and said land was not reserved, sold,

granted, or otherwise appropriated and was free from pre-emption and all other claims and rights.

VI.

That the said lands, after the definite location of said line as aforesaid, were duly conveyed by the Northern Pacific Railroad Company to the plaintiff.

VII.

That the plaintiff is the owner in fee simple of said lands and entitled to the possession thereof, but the defendant unlawfully withholds possession to plaintiff's damage, in the sum of Five Hundred ($500.00) Dollars, and for costs.

WHEREFORE, plaintiff demands judgment that the defendant deliver up possession of the premises to the plaintiff, and for damages for withholding the same, in the sum of Five Hundred ($500.00) Dollars, and for costs.

(Signed.) CANNON & FERRIS,
CHARLES DONNELLY,
Attorneys for Plaintiff. [5]

State of Washington,
County of Spokane,—ss.

C. R. Lonergan, being first duly sworn, upon oath deposes and says: That he is General Agent of and for the Northern Pacific Railway Company, a corporation, plaintiff in the above-entitled action, and has his office as such general agent and resides in the City of Spokane, Washington; that he makes this affidavit for and on behalf of said corporation; that he has read the above and foregoing complaint, knows the contents thereof and believes the same to be true.

(Signed.) C. R. LONERGAN.

Subscribed and sworn to before me this 10 day of March, 1915.

(Signed.) WALTER A. WHITE,
Notary Public in and for the State of Washington,
Residing at Spokane. **[6]**

In the Superior Court of the State of Washington, for the County of Stevens.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

vs.

GEORGE F. WISMER,
Defendant.

Petition for Removal.

Your petitioner, George F. Wismer, defendant herein, respectfully shows to this Court:

1. That the matter and amount in controversy in the above-entitled cause, exclusive of interest and costs, exceed the sum of Three Thousand Dollars ($3,000.00).

2. That the suit herein is of a civil nature at law, arising under the laws of the United States in this: That the plaintiff claims to be the owner in fee simple of the premises described in the complaint under and by virtue of the grant to its predecessor from the United States under the Act of Congress approved July 2, 1864 (13 Stats., L. 365), plaintiff claiming that on the 4th day of October, 1880, its predecessor in interest, the Northern Pacific Railroad Company, definitely located that portion of its line opposite the lands in controversy and filed a

plat thereof in the office of the Commissioner of the General Land Office; and further claiming that at the date of the filing of said map of definite location, the land described in the complaint was public land of the United States, not mineral, within forty (40) miles of the Northern Pacific Railroad as so definitely located, to which the [7] United States had full title, and which land was not reserved, granted, or otherwise appropriated, and was free from pre-emption and all other claims and rights.

3. That the defendant claims to be entitled to the possession of said premises under and by virtue of a homestead entry, duly made and received at the United States Land Office in the City of Spokane, State of Washington, on or about the 2d day of April, 1910; and defendant further claims that the land described in the complaint herein on or about the 4th day of October, 1880, had been, by the United States, reserved from sale, grant and other appropriation for the use and benefit of the Spokane Indians as a reservation and continued to be such until the Executive Proclamation of the President, dated the 22d day of May, 1909, opening up said reservation to entry.

4. That in compliance with such Executive Proclamation, the defendant did make his entry in all respects as required by law in the United States Land Office, in the City of Spokane, State of Washington, and thereafter entered in to the possession of said premises, and has ever since so remained; that defendant has complied with all the laws of the United States relating to the entry of public

lands, and the rules and regulations of the Department of the Interior relating thereto, and that on the 9th day of April, 1913, a patent covering the land described in the complaint was duly issued by the United States of America to said George F. Wismer, and defendant is entitled to the possession of said premises.

5. That plaintiff and defendant herein have entered into a stipulation, which is attached hereto, agreeing that this Court enter an order removing this case to [8] the District Court of the United States for the Northern Division of the Eastern District of Washington, and defendant prays this Honorable Court to proceed no further herein, except to make the order of removal required by law, and to cause the record herein to be removed into the District Court of the United States for the Northern Division of the Eastern District of Washington.

(Signed.) FRANCIS A. GARRECHT,
United States Attorney.

State of Washington,
County of Spokane,—ss.

Francis A. Garrecht, being first duly sworn, deposes and says: That he is the United States Attorney for the Eastern District of Washington, and as such was directed by the Attorney General of the United States to appear for the defendant herein; that affiant makes this verification for the reason that defendant is not now within the County of Spokane; that the foregoing petition is true to the best of his knowledge, except as to matters therein alleged upon information and belief, and as to those

matters he believes it to be true.

(Signed.) FRANCIS A. GARRECHT.

Subscribed and sworn to before me this 15th day of March, A. D. 1915.

[Seal] (Signed.) J. E. McGOVERN,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington. [9]

In the Superior Court of the State of Washington, in and for the County of Stevens.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

vs.

GEORGE F. WISMER,
Defendant.

Stipulation for Removal.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by their respective attorneys, that this Court make and enter an order in the above-entitled cause removing said case to the District Court of the United States for the Northern Division of the Eastern District of Washington.

Dated this 15th day of March, A. D. 1915.

(Signed.) EDWARD J. CANNON,
Attorney for Plaintiff.

(Signed.) FRANCIS A. GARRECHT,
United States Attorney, and Attorney for Defendant. [10]

In the Superior Court of the State of Washington, for the County of Stevens.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

vs.

GEORGE F. WISMER,
Defendant.

Order of Removal.

The defendant herein having within the time provided by law filed his petition for removal of this cause to the District Court of the United States for the Northern Division of the Eastern District of Washington, and having at the same time filed a stipulation of the parties to said action, whereby it is agreed that this Court make and enter an order herein removing this cause to the said District Court of the United States for the Northern Division of the Eastern District of Washington.

NOW, THEREFORE, the Court being fully advised in the premises, it is

CONSIDERED and ORDERED that this cause be removed for trial to the District Court of the United States for the Northern Division of the Eastern District of Washington, pursuant to the statute of the United States, and that all other proceedings of this court be stayed.

Done in open court this 15th day of April, A. D. 1915.

(Signed.) W. H. JACKSON,
Judge. [11]

[Certificate of Clerk to Copy of Order of Removal.]

State of Washington,
County of Stevens,—ss.

I, L. C. Richardson, County Clerk and Ex-Officio Clerk of the Superior Court of the said County and State, do hereby certify that the above and foregoing is a true and correct copy of Order of Removal of case for trial to District Court of the U. S. for Northern Division of E. District of Washington, in the cause wherein Northern Pacific Railway Company is Plaintiff, and George F. Wismer is Defendant, as the same now appears on file and of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court this 15th day of April, A. D. 1915.

[Superior Court Seal]

(Signed.) L. C. RICHARDSON,
County Clerk.
By E. C. Richardson,
Deputy. [12]

[Certificate of Clerk to Transcript of Record on Removal.]

In the Superior Court of the State of Washington, in and for the County of Stevens.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,
Plaintiff,

vs.

GEORGE F. WISMER,
Defendant.

State of Washington,
County of Stevens,—ss

I, L. C. Richardson, Clerk of the Superior Court of the State of Washington for the County of Stevens, do hereby certify that the above and foregoing Summons and Complaint, Petition and Stipulation for Removal, and Order of Removal, are all the files in the above-entitled cause, as the same now appear on file and of record in my office in Appearance Docket No. 12, on page six.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court this 15th day of April, 1915.

[Superior Court Seal]

(Signed.) L. C. RICHARDSON,
Clerk.
By E. C. Richardson,
Deputy.

[Endorsements]: Transcript on Removal. Filed in the U. S. District Court for the Eastern District of Washington. April 16, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [13]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

No. 2195.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff,

vs.

GEORGE F. WISMER,

Defendant.

Answer.

For answer to the complaint of plaintiff herein:

1. Defendant denies each and every allegation in paragraph six (6) thereof.

2. Defendant admits that he is in possession of the land described in the complaint and that he withholds possession thereof from the plaintiff, but alleges the same to be under claim of right and lawfully, and denies that the plaintiff is the owner in fee simple of said premises, or is entitled thereto, or to the possession thereof.

Further answering said plaintiff, defendant avers and alleges:

3. That for many years prior to August 18, 1877, and from time immemorial, the lands described in the complaint, and other adjoining lands around and about, were Indian lands, occupied, used, enjoyed and claimed by the Indians, and that during all of said time none of the rights and claims of said Indians in and to the said lands and premises had been extinguished.

4. That to preserve the peace, to promote the welfare of the Indians and, as well, for the purpose of extinguishing all their rights in other portions of the public domain, it was the policy of the Executive [14] Department of the Government of the United States to gather all roving bands of Indians on permanent reservations, and to that end the War Department and the Department of the Interior were directed to and did act and co-operate together.

5. That in August, 1877, one E. C. Watkins, who was then and there an Indian Inspector of the Department of the Interior, acting in his official capacity, and by the direction of the Secretary of the Interior, and with the approval of the President of the United States, held conference with various northern Indian tribes, some of whom were occupying the eastern portion of the then Territory of Washington.

6. That the said E. C. Watkins, acting in his official capacity, as aforesaid, on August 18, 1877, entered into an agreement in writing with the chiefs and members of the Spokane tribe of Indians, a copy of which agreement is hereto attached and marked exhibit "A."

7. That the said agreement was entered into for the purpose of collecting the said Indians belonging to the said tribe on the reservation described in said agreement, there to engage in agricultural pursuits and establish permanent homes, and to extinguish the general Indian title of the said Indians in all other lands not within the said reservation; and as a means of influencing said Indians to continue in friendly

relations with the whites, to remain in peace with the Government of the United States, and abide by all laws of the same, and obey the orders of the Indian Bureau and the officers acting thereunder.

8. That in pursuance of said agreement, the Indians already on said lands agreed to remain thereon, and others [15] not so located agreed to go upon said lands, which it was agreed should be and remain a reservation for such Indians.

9. That in the summer of 1877, certain Indian bands and tribes of the Northwest country had begun hostilities upon, and had committed depredations against white settlers in the Indian Country in Eastern Washington, Oregon and Northern Idaho. And for five or six years thereafter said Indians continued to menace the white population living in said territory.

10. That the said Indians who had gone upon the warpath sought to induce others of their race who were engaged in peaceful pursuits to join in their wars, hostilities and depredations.

11. That during all of the times mentioned, many of the Indians belonging to said peaceful bands and tribes were living on, around and about the lands described in the complaint, and had actually made their homes thereon, and some of them had made valuable improvements.

12. That said E. C. Watkins, Indian Inspector as aforesaid, acting in his official capacity, pursuant to said agreement prior to November 26th, 1877, located the Spokane Tribe of Indians on the said reservation, and said Indians remained upon and continued in

use, occupancy, possession and enjoyment of said tract of land described in said agreement as their reservation continuously thereafter until the year 1910.

13. That about August, 1880, white settlers began to encroach upon the said lands so claimed by the said Indians as their reservation.

14. That on or about the 3d day of September, 1880, one H. H. Pierce, First Lieutenant of the 21st Infantry [16] of the United States Army, by command of Brigadier-General Howard of the United States Army, and under the direction and authority of the Secretary of War, duly and legally, by order, set apart as a reservation for said Indians, the tract of land above described, including the premises mentioned in the complaint, a copy of which said order is hereto attached, marked exhibit "B," and made a part hereof; that such order was made in pursuance of, and to carry out the said agreement made between said Indians and the United States, acting by and through said E. C. Watkins, Indian Inspector as aforesaid.

15. That the lands so reserved, which included the lands described in the complaint, were so set apart under authority of the President for the exclusive use and occupancy of the Indians; that it was done for the care and protection of the Indians, out of public necessity and for the preservation of the public peace.

16. That the said agreement with the Indians, and said order creating and setting aside said tract of land as a reservation was recognized and ratified by the Secretary of War and the Secretary of the In-

terior, and approved by the President of the United States, and on January 18, 1881, the formal order and proclamation thereof was made, a copy of which is hereto attached, marked exhibit "C."

17. That all of the aforesaid matters were made known to Congress and were of public notoriety, and the reservation so established on September 3, 1880, was recognized as such continuously thereafter until the Act of May 29, 1908.

18. That the lands described in the complaint were [17] a part of said reservation and as such continued to be a part of the Public Indian Reservation, and were actually, uninterruptedly and continuously set apart, occupied, used, enjoyed and claimed by the Indians from a time preceding that when the railroad company's line of road was definitely fixed and the plat filed in the office of the Commissioner of the General Land Office, to and including the time of approval of said Act of May 29, 1908.

19. That at the time when such definite location was made, to wit, October 4, 1880, the lands described in the complaint were, by reason of the premises, reserved and appropriated for, and subject to the claims and rights of said Indians, and occupied by them, and no right, title or interest whatsoever therein passed to the company under the Act of July 2, 1864, or otherwise.

20. That under the Act of Congress approved May 29, 1908 (35 Stats. L. 458), and the proclamation of the order of the President of the United States of May 22, 1909, the said tract of land became subject to homestead entry on May 1, 1910; that on

or about April 2, 1910, at the United States Land Office, in the City of Spokane, State of Washington, defendant made homestead entry upon the premises described in the complaint, which entry was duly accepted by the register and receiver of said land office.

21. That on April 9, 1913, patent to said land was issued to this defendant, and in virtue of his said entry and the patent thereafter issued to him, defendant entered into possession of said premises on or about April 2, 1910, and ever since has continued to and now does occupy the same. [18]

For another, further, separate and second defense:

Defendant reaffirms and realleges paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 in words and figures as in the first defense heretofore set forth, and each and every allegation therein contained and to the same effect as if here restated.

22. That prior to said homestead entry, the plaintiff asserted its claim herein before the General Land Office to the land described in the complaint, and other lands included within the Spokane Indian Reservation, basing its title thereto upon the grant made by the Act of July 2, 1864 (13 Stats. L., 365); but said claim was denied and on appeal decided by the Secretary of the Interior adversely to the contention of plaintiff herein, a copy of which decision is hereto attached and marked exhibit "D."

For another, further, separate and third defense:

Defendant reaffirms and realleges paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18,

19, 20, and 21 in words and figures as in the first defense heretofore set forth, and each and every allegation therein contained and to the same effect as if here restated.

23. That the recognition of and compliance with the said agreement made with said Indians, and the setting aside of a permanent reservation in pursuance thereof, and the determination of the rights of the Indians therein were political questions which were passed upon by the President and the Congress and the settlement of which is not subject to change or review by the courts. [19]

For another, further, separate and fourth defense:

Defendant reaffirms and realleges paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 in words and figures as in the first defense heretofore set forth, and each and every allegation therein contained and to the same effect as if here restated.

24. That defendant ought not now be permitted to contend that the lands described in the complaint, or any of the other lands comprised in the Spokane Indian Reservation were subject to the grant of the Northern Pacific Railroad Company on October 4, 1880, for the reason that relying upon the agreements, orders, acts and proclamations aforesaid, the said Indians in 1877 relinquished all their right to the other lands in Washington Territory and retired upon and established themselves upon the said Spokane Indian Reservation, and thereby the Indian title to the other lands within the grant was extinguished and the predecessor in interest

of the said plaintiff, with full knowledge of the facts, and well aware that the said Indians believed that the lands set aside and reserved for them comprised a valid Indian Reservation, and relying thereon had relinquished all claim to other lands within said grant, acquired the immediate occupation, use, enjoyment, and title of lands within the grant so relinquished by said Indians which it otherwise would not have had, and said plaintiff should now be estopped to claim any of the lands embraced in the Spokane Indian Reservation.

WHEREFORE, Defendant prays that plaintiff take nothing herein, and that he recover his costs and [20] disbursements.

(Signed.) FRANCIS A. GARRECHT,
United States Attorney.

United States of America,
Eastern District of Washington,—ss.

Francis A. Garrecht, being first duly sworn, deposes and says:

That he is the attorney for the defendant herein; that the defendant is not now within the County of Spokane; that the affiant has read the foregoing answer, knows the contents thereof and believes the same to be true

(Signed.) FRANCIS A. GARRECHT.

Subscribed and sworn to before me this 20th day of April, A. D., 1915.

(Signed.) W. H. HARE,
Clerk United States District Court, Eastern District of Washington. [21]

Exhibit "A" [to Answer—Agreement Between Indians and Indian Inspector].

IN COUNCIL AT SPOKANE FALLS, W. T.
August 18th, 1877.

We, the undersigned Chiefs and head men of the Spokane Tribe of Indians for ourselves and our people hereby agree to accept the following described land for our reservation: Beginning at the source of the Chimokan Creek in Washington Territory, thence down said creek to the Spokane River, thence down said river to the Columbia River, thence up the Columbia River to the mouth of Nimchin Creek, thence easterly to the place of beginning.

And we do further agree to go upon the same by the first of November next with the view of establishing our permanent homes thereon and engaging in agricultural pursuits. We hereby renew our friendly relations with the whites and promise to remain at peace with the Government and abide by all laws of the same, and obey the orders of the Indian Bureau and the officers acting thereunder.

Names of Witnesses:	Names.	
		his
E. C. WATKINS,	Whistle-poo-lum	X Spokane
U. S. Indian Inspector.		mark
		his
	Quis-e-me-ow	X Spokane
		mark
		his
	Ah-mi-melschin	X Spokane
		mark
		his
FRANK WHEATON,	Cos-to-akan	X Spokane
Bt. Major Gen. U. S. Army.		mark
Col. 2nd Infantry.		his
	Ora-pa-han	X Spokane
M. C. WILKINSON,		mark
Bvt. Capt. U. S. Army.		his
Aide de Camp.	Paul	X Ora-pa-han.
		mark

[22]

Exhibit "B" [to Answer—Order Directing Protection of Certain Territory Against Settlements by Others Than Indians].

MILITARY ORDER.

HEADQ'RS DEPT. OF THE COLUMBIA,
IN THE FIELD, SPOKANE FALLS, W. T.

September 3, 1880.

(FIELD ORDERS—No. 8.)

Whereas, in consequence of a promise made in August, 1877, by E. C. Watkins, Inspector of the Interior Department, to set apart, or have set apart, for the use of the Spokane Indians the following described territory, to wit: Commencing at the mouth of Cham-a-kane Creek, thence north eight miles in direction of said creek, thence due west to the

Columbia River, thence along the Columbia and Spokane Rivers to the point of beginning—the Indians are still expecting the Executive order in their case and are much disturbed by the attempts of squatters to locate land within said limits, it is hereby directed that the above-described territory, being still unsurveyed, be protected against settlements by other than said Indians until the survey shall be made, or until further instructions. This order is based upon plain necessity to preserve the peace until the pledge of the Government shall be fulfilled, or other arrangements accomplished.

The Commanding Officers of Forts Coeur d'Alene and Colville, and Camp Chelan are charged with the proper execution of this order.

By command of Brigadier-General Howard.

H. H. PIERCE,
1st Lieut. 21st Infantry,
Acting Aide-de-Camp.

Official. [23]

Exhibit "C" [to Answer—Executive Order Setting Aside and Reserving Certain Lands for Spokane Indians].

Executive Mansion,
January 18, 1881.

It is hereby ordered that the following tract of land situated in Washington Territory be, and the same is hereby, set aside and reserved for the use and occupancy of the Spokane Indians, namely:

Commencing at a point where the Chemakane Creek crosses the forty-eighth parallel of latitude; thence down the East bank of said creek to where it

enters the Spokane River; thence across said Spokane River westwardly along the southern bank thereof to a point where it enters the Columbia River; thence across the Columbia River northwardly along its western bank to a point where said river crosses the said forty-eighth parallel of latitude; thence East along said parallel to the place of beginning.

R. B. HAYES. [24]

Exhibit "D" [to Answer—Decision of Secretary of Interior].

March 7, 1910.

The Commissioner of the General Land Office.

Sir:

This is the appeal of the Northern Pacific Railway Company from your office decision of February 15, 1910, denying the claim of said company to 64,000 acres of land, falling within the place limits of the grant made to said company by the Act of July 2, 1864 (13 Stats., 365), because of its inclusion within the Spokane Indian Reservation, and holding that said lands are subject to disposition under the Act of May 29, 1908 (35 Stat., 458).

It appears from your said office decision, and it is not disputed, that in August 1877, E. C. Watkins, an Indian Inspector of this Department, had a conference with the Spokane Indians, and set apart, or promised to have set apart, for their use, a certain tract of land; that on November 26, 1877, said Inspector made a report to the Commissioner of Indian Affairs relative to the consolidation of the Indians of Oregon and Washington Territory. In said re-

port he refers to the Colville Indian Reservation, to to which the Spokane Indians belonged, and states that he located the Spokane and Palouse Indians north of the Spokane River, giving them a tract about 20 miles square adjoining the Colville Reservation. This tract includes the land in question. In a report dated August 18, 1880, published in the Indian Office, Mr. John A. Simms, United States Indian Agent, Colville Agency, Washington, shows that the Spokane Indians, numbering 685, "are living along the Spokane River and vicinity, from Spokane Falls to its junction with the Columbia," these being the same lands set apart **[25]** for them by Inspector Watkins; and that the greater number of the Spokane Indians had farms upon which they raised most of their subsistence. On September 3, 1880, H. H. Pierce, First Lieutenant, 21st Infantry, by command of Brigadier-General Howard, proclaimed, in Special Field Order No. 8, Headquarters, Department of the Columbia, in the field, Spokane Falls, Washington, a reservation for the Spokane Indians, describing the lands as given above in the agreement made by Inspector Watkins, and stated in said order that it was for the purpose of protecting the lands against settlement other than by said Indians, until the survey should be made, or until further instructions, and was based upon plain necessity to preserve the peace until the pledge of the Government should be fulfilled or other arrangements accomplished. The Executive order setting apart said Indian reservation is dated January 18, 1881, and described the lands practically the same

as in said Order No. 8.

The definite location of the Northern Pacific Railway Company's line of road, coterminous with and opposite the lands in question, was made October 4, 1880. It thus appears that at the time at which the Railway Company's claim would ordinarily have attached to said lands they were included in the aforesaid reservation, created by the said H. H. Pierce, September, 3, 1880, but had not been included within the Executive order setting apart said Indian Reservation, January 18, 1881.

Your office decision holds that the negotiations of the said E. C. Watkins, the facts stated in the said report of John A. Simms, United States Indian Agent, and the order of H. H. Pierce of September 3, 1880, constituted such reservation of this land as prevented the attachment of the **[26]** railway grant upon definite location. This is complained of upon appeal, but no authorities are cited in support of the appeal except the case of Buttz v. Northern Pacific Railway Company, 119 U. S. 55, which, it is contended, is authority for the contention of the company that these lands had not been withdrawn prior to January 18, 1881, and that they were therefore subject to the company's grant, October 4, 1880. The case cited is not in point, and furnishes no authority for the contention made.

The fact of the negotiations and of the military order above referred to is not denied upon the appeal, but the legal effect of these procedings is disputed.

Upon a careful consideration of the subject, it is

believed that these proceedings constituted such reservation of the land in question as brought them within the excepting clause of the grant of July 2, 1864.

The decision appealed from is affirmed, and your office will proceed to the disposition of these lands in accordance with the provisions of the act of May 29, 1908, *supra*.

Very respectfully,
(Signed) FRANK PIERCE,
First Assistant Secretary.

[Endorsements]: Due, legal and timely service of the foregoing Answer is admitted to have been made April 20, 1915.

E. J. CANNON,
Attorney for Plaintiff.

Answer. Filed April 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [27]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2195.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff,

vs.

GEORGE F. WISMER,

Defendant.

Reply.

Plaintiff for reply to the answer of the defendant herein:

Except in so far as defendant's answer admits the allegations of plaintiff's complaint, plaintiff denies each and every allegation, averment, matter and thing in defendant's answer contained whether as therein stated or otherwise.

WHEREFORE, plaintiff prays judgment as in its complaint asked.

(Signed.) EDWARD J. CANNON,
GEORGE M. FERRIS,
Attorneys for Plaintiff.

State of Washington,
County of Spokane,—ss.

C. R. Lonergan, being first duly sworn, upon oath deposes and says: That he is general agent of and for the Northern Pacific Railway Company, a corporation, plaintiff in the above-entitled action, and has his office as such general agent and resides in the city of Spokane, Washington; that he makes this affidavit for and on behalf of said corporation; that he has read the above and foregoing reply, knows the contents thereof and believes the same to be true.

(Signed.) C. R. LONERGAN, [28]

Subscribed and sworn to before me this 5th day of May, 1915.

(Signed.). WALTER A. WHITE,
Notary Public in and for the State of Washington,
Residing at Spokane.

[Endorsements]: Reply. Served May 5th, 1915. Francis A. Garrecht, U. S. Attorney. Filed May 5, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [29]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2195.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff,

vs.

GEORGE F. WISMER,

Defendant.

Stipulation Waiving Jury.

It is hereby stipulated and agreed by and between E. J. Cannon, attorney for the plaintiff herein, and Francis A. Garrecht, United States Attorney for the Eastern District of Washington, and attorney for the defendant herein, that this case may be submitted for determination to the Court without the intervention of a jury, in accordance with the provisions of Section 649 of the Revised Statutes of the United States.

Dated this 24th day of June, A. D. 1915.

(Signed.) EDWARD J. CANNON,
Attorney for Plaintiff.

(Signed.) FRANCIS A. GARRECHT,
United States Attorney and Attorney for Defendant.

[Endorsements]: Stipulation Waiving Jury. Filed in the U. S. District Court for the Eastern District of Washington, June 24, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. **[30]**

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2195.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff,

vs.

GEORGE F. WISMER,

Defendant.

Opinion.

CANNON & FERRIS and CHARLES DONNELLY, for Plaintiff.

FRANCIS A. GARRECHT, U. S. Atty., for Defendant.

RUDKIN, District Judge.

This is an action of ejectment to recover eighty acres of land forming part of an odd section within the limits of the Spokane Indian Reservation as established by the Proclamation of the President of January 18, 1881. The action was commenced in the Superior Court of Stevens County, but was removed to this court on the petition of the United States Attorney for this district, appearing for the defendant, on the ground that a federal question was

involved. By written stipulation of the parties a jury was waived and the case submitted to the Court on an agreed statement of facts. Both parties claim title directly and immediately from the United States, and their respective claims may be thus briefly stated in chronological order.

First, as to the claim of the plaintiff.

By Section 3 of the act of Congress of July 2, 1864 (13 Stat., 65) there was granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of a railroad and telegraph line to **[31]** to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company might adopt, through the Territories of the United States, and Ten alternate sections of land per mile on each side of said railroad whenever it passed through any State, and whenever on the line thereof, the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from preemption, or other claims or rights at the time the line of said railroad was definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office. The land in controversy *in* nonmineral in character and is within forty miles of the line of road as definitely located opposite thereto by a plat filed in the office of the Commissioner of the

General Land Office on the 4th day of October, 1880. Thereafter the grantee constructed and completed its line of road opposite the lands in controversy, and the same was examined and approved by the commissioners appointed by the President of the United States. The plaintiff is the successor in interest to the Northern Pacific Railroad Company and has an indefeasible title to the land if the United States had full title thereto and the same was not reserved, sold granted, or otherwise appropriated, and was free from preemption and other claims and rights at the time the line of road was definitely fixed and the plat filed in the office of the Commissioner of the General Land Office.

Second, as to the claim of the defendant.

On and prior to the 18th day of August, 1877, the land in controversy, and other surrounding lands, were unsurveyed public lands of the United States to which the Indian title or right of occupancy had never been extinguished. On the latter date [32] E. C. Watkins, an Indian Inspector attached to the Department of the Interior, and acting under instructions from the Secretary of the Interior, held a conference with the chiefs and head men of the Spokane Tribe of Indians with a view of inducing them to give up their nomadic life, cease their warfare on the whites, establish permanent homes, and take up agricultural pursuits on a reservation that the Government promised to set apart for them. As a result of this conference or council the following agreement was signed by the chiefs and head men of the tribe:

"We, the undersigned chiefs and head men of the Spokane Tribe of Indians, for ourselves and our people hereby agree to accept the following described land for our reservation; beginning at the Source of the Chimokan Creek in Washington Territory, thence down said Creek to the Spokane River, thence down said river to the Columbia River; thence up the Columbia River to the Mouth of Nim Chin Creek, thence Easterly to the place of beginning."

"And we do further agree to go upon the same by the first of November next, with a view of establishing our permanent homes thereon and engaging in agricultural pursuits. We hereby renew our friendly relations with the whites and promise to remain at peace with the Government and abide by all laws of the same, and obey the orders of the Indian Bureau and Offices acting thereunder."

Thereupon the Indian Inspector removed all Indians of the Spokane Tribe not already living within the limits of the reservation thus agreed upon to the reservation, and on the 24th day of November, 1877, reported his doings to the Commissioner of Indian Affairs. On the 23rd day of January, 1878, the Secretary of the Interior communicated this report to the United States Senate in response to a resolution of that body, and the same was referred to the committee on Indian Affairs and ordered printed. During the month of August, 1880, the Indians on the reservation were much disturbed by the attempts of squatters to locate on the land within the limits of

the reservation thus set apart for them, and on the 3rd day of September, 1880, Brigadier General Howard of the Department of the Columbia, with the concurrence and approval of the Secretary of War and the Secretary of the Interior, promulgated the following Order: [33]

"Whereas, in consequence of a promise made in August, 1877, by E. C. Watkins, Inspector of the Interior Department, to set apart, or have set apart, for the use of the Spokane Indians, the following described territory, to wit:

"Commencing at the Mouth of the Cham-a-Kane Creek; thence North Eight Miles in direction of said Creek; thence due West to the Columbia River; thence along the Columbia and Spokane Rivers to the point of beginning—The Indians are still expecting the executive order in their case, and are much disturbed by the attempts of squatters to locate land within said limits; it is hereby directed that the above described territory, being still unsurveyed, be protected against settlement by other than said Indians until the survey shall be made, or until further instructions. This order is based upon plain necessity to preserve the peace until the pledge of the Government shall be fulfilled, or other arrangements accomplished.

"The Commanding officers of Forts Coeur d'Alene and Colville and Camp Chelan are charged with the proper execution of this order."

By proclamation of January 18, 1881, the Spokane

Indian Reservation was established with the following boundaries:

> "Commencing at a point where the Chemakane Creek crosses the Forty-eighth parallel of latitude; thence down the East bank of said Creek to where it enters the Spokane River; thence across said Spokane River westwardly along the Southern Bank thereof to a point where it enters the Columbia River; thence across the Columbia River northwardly along its Western bank to a point where such river crosses the said Forty-eighth parallel of latitude; thence East along said parallel to the place of beginning."

I understand there is no material difference between the boundaries of the reservation as defined in the agreement of August 18, 1877, the order of September 3d, 1880, and the proclamation of January 18, 1881, and that the land in controversy is within all three. Ever since the latter part of 1877 the Spokane Tribe of Indians have remained upon and claimed the lands within this reservation as their reservation by reason of the different agreements, orders, and proclamation herein set forth and have made their homes thereon cultivating the land in Indian fashion.

By Act of Congress of May 29, 1908 (35 Stat., 458) the Secretary of the Interior was authorized and directed to cause allotments to be made under the provisions of the allotment laws of the United States to all persons having tribal rights or holding tribal relations and who might rightfully belong on the Spokane Indian Reservation and who had not there-

tofore received [34] allotments. The Act further provided that upon the completion of the allotments the Secretary of the Interior should classify the surplus lands as agricultural and timber lands, and that the lands classified as agricultural lands should be open to settlement and entry under the homestead laws of the United States by a proclamation of the President which would prescribe the time and the manner in which the land might be settled upon, occupied and entered by persons entitled to make entry thereof, and that no person should be permitted to settle upon, occupy or enter any of such lands except as prescribed in the proclamation. By other provisions of the act the United States acted as trustee for the Indians in disposing of the Surplus lands and the purchase price of $5.00 per acre was credited to the Spokane Tribe. The allotments were made, the lands classified, the proclamation issued, and defendant made entry of the land in controversy, complied with all the requirements of the Homestead Law, and received a patent.

Under the foregoing facts did the United States have full title to the lands embraced in the Spokane Indian Reservation, and were the same free from preemption or other claims and rights at the time the line of road was definitely fixed and the plat filed in the office of the Commissioner of the General Land Office. It is firmly established by repeated decisions of the Supreme Court that "only such lands should pass to the Northern Pacific as were public lands in the fullest sense of the term and free from all reservations and appropriations and all rights or claims in

behalf of any individual or corporation at the time of the definite location of its road."

No. Pac. Rd. vs. Musser Sauntry Co. 168 U. S., 604,609.

Northern Lumber Company vs. O'Brien, 204 U. S., 190, and cases cited. [35]

It is equally well settled that the validity of the right or claim is not material.

"It was not the intention of Congress to open a controversy between the claimant and the Railroad company as to the validity of the former's claim; it was enough that the claim existed, and the question of the validity was a matter to be settled between the Government and the claimant, in respect to which the railroad company was not permitted to be heard."

United States vs. So. Pac. Rd. 146 U. S. 570, 606.

"This section expressly excludes from preemption and sale all lands claimed under any foreign grant or title. It is said that this means 'lawfully' claimed; but there is no authority to import a word into a statute in order to change its meaning. Congress did not prejudge any claim to be lawful, but submitted them all for adjudication."

Newhall vs. Sanger, 92 U. S. 761, 765.

"Whether or not valid is immaterial to the question here; for, as has often been decided by the Supreme Court, it is not the validity of such claim, but the fact that it existed at the time of the definite location of the railroad, that excluded

the lands in controversy from the category of 'public lands' to which alone the company's grant attached."

United States vs. So. Pac. R. Co. 76 Fed., 134, 136, See also, Northern Lumber Co vs. O'Brien, *Supra*, and cases cited.

In the light of the foregoing decisions it seems manifest that the Spokane Tribe of Indians had a special claim to the lands embraced in this reservation at the time of the definite location of the railroad such as would except them from the operation of the grant to the company. Whether that claim was a valid one, enforceable against the United States, we need not enquire. It is sufficient that the claim existed. The lands had been set apart for the use of the Indians by both the civil and military authorities of the Government; the officers of the Government represented to the Indians that they came among them for the purpose of establishing a reservation, armed with authority from the Secretary of the Interior and the President of the United States; the Indians relied upon these representations, moved onto the reservation, established homes there, and relinquished their more general claim to [36] other public lands in the vicinity. After all this had transpired the Government was bound, in equity and good conscience, to recognize the claim of the Indians and confirm the acts of its officers, and did so at an early opportunity by public proclamation of the President. It is idle, now to enquire whether these officers had technical authority under the law to establish a reservation The parties were not dealing on an equal footing. A

powerful Government was treating with an inferior race, and to repudiate the claim of the Indians at this late day because of the technical rules of law, of which the Indians were totally ignorant, would be an act of perfidy such as the Government has never been guilty of in all its dealings with the numerous tribes of Indians within its borders.

If the lands were excepted from the operation of the grant at the date of definite location, by reason of the claim of the Indians, they were excepted for all purposes and for all time.

Nor. Pac. Rd. Co. vs. Sanders, 166 U. S., 620, and cases cited.

There is nothing in the case of Northern Pacific Railway Co. vs. Mitchell, 208 Fed., 469, or Buttz vs. Nor. Pac. Rd. Co. 119 U. S., 55, in conflict with these views. In the former the defendant claimed that the lands were reserved by reason of the report of the Indian Inspector and the order of General Howard, but the Court ruled otherwise. The special claim of the Indians was not advanced or relied upon: In the latter the Court was considering only the general right of occupancy of the Indians.

Having reached the conclusion that the land in question was excepted from the grant by reason of the claim of the Indians it becomes unnecessary to inquire whether the Government might not set apart as an Indian Reservation any lands to which the Indian title had not been extinguished, even after the map of definite [37] location had been filed.

Much might be said in support of that right in the

Government, but I will not discuss the question further.

For the foregoing reasons, I am of the opinion that the plaintiff has no title to the land involved in this suit under the grant of its predecessor in interest or otherwise. Inasmuch as the case was submitted upon an agreed statement of facts I deem it unnecessary to make any findings except the general one, that the plaintiff is not the owner or entitled to the possession of the premises described in the complaint. To this finding the plaintiff is allowed an exception as well as an exception to the refusal of the Court to make the opposite finding. My attention having been called to the fact that the defendant died since the submission of the case, and that no personal representative has been appointed, judgment will be entered as of June 24, 1915, the date of submission. Let findings and judgment be prepared accordingly.

[Endorsements]: Opinion. Filed in the U. S. District Court for the Eastern District of Washington, August 11, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [38]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2195.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff,

vs.

GEORGE F. WISMER,

Defendant.

Findings of Fact and Conclusions of Law.

This cause came on regularly for trial on the 24th day of June, A. D. 1915, before the Court without a jury, a stipulation having been theretofore signed and filed waiving a trial by jury; and E. J. Cannon, Esquire, appearing as attorney for the plaintiff herein, and Francis A. Garrecht, Esquire, United States Attorney, appearing for the defendant, and from the evidence submitted, the Court makes the following

FINDINGS OF FACT.

That the plaintiff has not any interest in or title to any of the lands and premises described in the complaint and is not the owner or entitled to the possession thereof; (Plaintiff excepts and exception allowed.)

and as

CONCLUSIONS OF LAW.

That plaintiff's action should be dismissed and defendant recover his costs. (Plaintiff excepts and exception allowed.)

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Findings of Fact and Conclusions of Law. Filed August 13, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [39]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2195.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Plaintiff,

vs.

GEORGE F. WISMER,
Defendant.

Judgment.

This cause came on regularly for trial on the 24th day of June, A. D. 1915, before the Court without a jury, a stipulation having been theretofore signed and filed waiving a trial by jury; and E. J. Cannon, Esquire, appearing as attorney for the plaintiff herein, and Francis A. Garrecht, Esquire, United States Attorney, appearing for the defendant, and the evidence being closed and argument of counsel having been made and the cause having been submitted for

consideration and decision, and the Court being fully advised in the premises,

WHEREFORE, it is considered, ordered and adjudged that plaintiff take nothing herein; that this action be dismissed and that defendant recover his costs, taxed at $——; and that this judgment be entered as of date July 24, 1915.

Done in open court this 13th day of August, 1915.

(Plaintiff excepts and exception allowed.)

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Judgment. Filed August 13, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [40]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2195.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff,

vs.

GEORGE F. WISMER,

Defendant.

Findings of Fact and Conclusions of Law (Plaintiff's Proposed).

This cause came on regularly for trial on the 24th day of June, A. D. 1915, before the Court without a jury, a stipulation having been theretofore signed and filed waiving a trial by jury, and Mr. E. J. Cannon

appearing as attorney for plaintiff herein and Mr. Francis A. Garrecht, United States Attorney, appearing for the defendant, and from the evidence submitted, the Court makes the following

FINDING OF FACT.

That the plaintiff is the owner and entitled to the possession of the lands and premises described in the complaint and that the defendant has no interest therein and no right to the possession thereof; and as (Refused; exception allowed.)

CONCLUSION OF LAW.

That said plaintiff is the owner in fee simple and entitled to the exclusive possession of the property described in the complaint, and that said plaintiff recover of defendant its costs.

(Refused; exception allowed.)

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Findings of Fact and Conclusions of Law. Filed August 13, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [41]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2195.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff,

vs.

GEORGE F. WISMER,

Defendant.

Judgment (Plaintiff's Proposed).

This cause came on regularly for trial on the 24th day of June, A. D. 1915, before the Court without a jury, stipulation having been theretofore signed and filed waiving a jury trial, Mr. E. J. Cannon appearing as attorney for the plaintiff herein and Mr. Francis A. Garrecht, United States Attorney, appearing for the defendant, and the evidence being closed and argument of counsel having been made and the cause having been submitted for consideration and decision, and the Court being fully advised in the premises;

WHEREFORE, it is considered, ordered and adjudged that the plaintiff is entitled to a judgment against the defendant quieting the title to the property described in said complaint in the plaintiff, free from any right or claim thereto in the defendant, and that the plaintiff is entitled to its costs taxed at the sum of $——, and that this judgment be entered as of date July 24, 1915.

(Refused; exception allowed.)

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Judgment. Filed August 13, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [42]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2195.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff,

vs.

GEORGE F. WISMER,

Defendant.

Petition for Substitution.

The petition of Emma A. Wismer respectfully shows to the Court that George F. Wismer, the defendant in the above-entitled action, is dead, having departed this life on July 25th, 1915.

That your petitioner is the proper representative and is the successor in interest to the said deceased party in the subject matter of said above-entitled action, and your petitioner, Emma A. Wismer, now voluntarily and respectfully asks to be admitted as a party to the said above-entitled action and that she be substituted as defendant therein.

(Signed) EMMA A. WISMER,
Petitioner.

State of Washington,
County of Spokane,—ss.

Emma A. Wismer, being first duly sworn, on oath deposes and says that she is the petitioner named in the foregoing petition; that she knows the contents thereof and the same are true as she verily believes.

(Signed) EMMA A. WISMER,

Subscribed and sworn to before me this 19th day of August, 1915.

(Signed) FRANCIS A. GARRECHT,
Notary Public in and for the State of Washington,
Residing at Spokane.

[Endorsements]: Petition of Emma A. Wismer, to be Substituted as Defendant. Filed August 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [43]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2195.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,
Plaintiff,

vs.

GEORGE F. WISMER,
Defendant.

Order Substituting Emma A. Wismer as Defendant.

Now, on this day, coming on to be heard the petition of Emma A. Wismer, asking that she be admitted as a party to the above-entitled action and substituted as the defendant therein, and Cannon & Ferris, attorneys for plaintiff, consenting thereto, and it appearing to the Court that the above-named defendant, George F. Wismer, is dead, having departed this life on July 25th, 1915, and that said Emma A. Wismer is the proper representative of and the successor in interest to said deceased party and

now voluntarily comes into Court petitioning to be admitted as a party to this action and substituted as the defendant therein;

On consideration whereof, it is now here ordered and adjudged by the Court that said Emma A. Wismer be and she is hereby substituted as the defendant in the above-entitled action in the place and stead of the above-named defendant, George F. Wismer, now deceased.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Order Substituting Emma A. Wismer as Defendant. Filed August 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [44]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

vs.

EMMA A. WISMER, Substituted for GEORGE F. WISMER, Deceased.
Defendant.

Notice of Filing of Plaintiff's Proposed Bill of Exceptions.

To the Above-named Defendant and to Francis A. Garrecht, Your Attorney:

You and each of you are hereby notified that on the 20th day of August, 1915, plaintiff filed in the office of

the clerk of the above-entitled court its proposed Bill of Exceptions in said cause, for use upon writ of Error of said cause to the United States Circuit Court of Appeals, a copy of which proposed Bill of Exceptions is herewith served upon you.

EDWARD J. CANNON,
CHARLES DONNELLY,
Attorneys for Plaintiff.

Service of within proposed Bill of Exceptions is hereby admitted this 20th day of August, 1915. Defendant hereby certifies that said Bill of Exceptions is true and correct, and hereby agrees that the Court may certify the same without further notice.

FRANCIS A. GARRECHT,
Attorney for Defendant. [45]

[Bill of Exceptions.]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2195.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff,

vs.

GEORGE F. WISMER,

Defendant.

Messrs. CANNON & FERRIS, Appearing for Plaintiff.

Mr. F. A. GARRECHT, Appearing for Defendant.

BE IT REMEMBERED, That heretofore, to wit,

on the 24th day of June, A. D. 1915, that before the Honorable Frank H. Rudkin, presiding as Judge of the District Court of the United States, for the Eastern District of Washington, Northern Division, this cause came on for hearing on the pleadings heretofore filed herein.

And thereupon, the following evidence was introduced and the following proceedings had: [46]

Index [of Exhibits].

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[47]

Mr. CANNON.—This is the case of the Northern Pacific Railway Company vs. George F. Wismer, and is a companion case to that of Northern Pacific Railway Company vs. Mitchell, which was decided by your Honor, and appears in 208 Federal Reporter, on page 469, the Government desiring to appeal and having on that occasion allowed the time to expire in which the appeal might be perfected.

This case is No. 2195, and the following facts are stipulated:

Stipulation [of Facts].

It is stipulated and agreed that the following facts may be deemed to have been established:

That the plaintiff is a corporation, organized under the laws of the State of Wisconsin, and has duly complied with the laws of, and is authorized to do business in, the State of Washington, and is the successor in interest of the Northern Pacific Railroad Company.

That by Act of Congress of July 2, 1864, (13 Stats. p. 365), incorporating the Northern Pacific Railroad Company, there was granted to said company, its successors and assigns, for the purpose of aiding in the construction of its railroad and telegraph lines to the Pacific Coast, and to secure safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty (20) alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten (10) alternate sections of land per mile on each side of said railroad, whenever it passes through any state, and [48] wherever on the line thereof, the United States has full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office.

That on October 4, 1880, the Northern Pacific Railroad Company definitely located that portion of its line of road from Spokane Falls to Wallula, opposite the lands in controversy, and filed a plat thereof in the office of the Commissioner of the General Land Office.

That on November 13, 1880, the Commissioner of the General Land Office withdrew from the public domain all odd numbered sections within forty (40) miles of said line so definitely located, and trans-

mitted his withdrawal order to the local land office at Colfax, Washington, which order was received and filed in said local land office November 30th, 1880; Colfax, Washington, then being the local land office at which the public lands of the United States surrounding the lands in controversy were subject to entry.

That thereafter, the Northern Pacific Railroad Company duly constructed its road on the line so definitely located, and that portion of its road opposite the lands in controversy, to wit, from Eight Mile Prairie to Wallula, was examined by Commissioners appointed by the President of the United States for that purpose, whose report was approved and said constructed road accepted by the President of the United States.

That the lands along said line of railroad were surveyed during the year 1887 and thereafter the railroad company used and dealt with the lands within said grant, except the odd [49] sections claimed by it in the Spokane Indian Reservation, which said odd sections were occupied by the Indians the same as other lands in said Reservation.

That on July 2, 1864 and on October 4, 1880, the South half (S½) of the Northwest quarter (NW¼) of Section Thirteen (13), Township Twenty-eight (28) North, of Range Thirty-nine (39) East, in the County of Stevens, in the State of Washington, was non-mineral land within the place limits of the land grant to the Northern Pacific Railroad Company, being less than forty miles from its line.

That on the 1st day of September, 1910, at nine A. M. an agent of the Northern Pacific Railway Com-

pany appeared in the land office at Spokane, Washington, and notified the officers and the public of its claim to certain lands, by posting therein a copy marked "Plaintiff's Exhibit 1" and reading said notice, which was as follows:

"Plaintiff's Exhibit 1"—Affidavit of Publication.

State of Washington,
County of Spokane,—ss.

I, Thomas Hooker, do solemnly swear that I am the Business Manager of the SPOKANE CHRONICLE, a daily newspaper of general circulation published once each day at the City of Spokane, State of Washington, that the notice attached hereto and which is a part of the proof of publication, was published in said newspaper for 7 times, the publication having been made from the 25th day of August, A. D. 1910, to the 1st day of September, A. D. 1910. That said Notice was published in the [50] regular and entire issue of every number of the paper during the period of time of publication, and that the notice was published in the newspaper proper and not in a supplement.

THOMAS HOOKER.

Subscribed and sworn before me at the City of Spokane, on this 7th day of September, A. D. 1910.

[Notary's Seal] G. W. ROCHE,
Notary Public Residing at Spokane, Washington.

To the Register and Receiver, United States Land Office, Spokane, Wash., and to All Persons Making Entry of Lands in the Former Spokane Indian Reservation:

You are hereby notified that the Northern Pacific

That for the purpose of collecting the said Indians belonging to the said tribe on a reservation, there to engage in agricultural pursuits and establish permanent homes, and to extinguish the general Indian title of any of the said Indians to all other lands not within the said reservation, and as a means of influencing said Indians to continue in friendly relations with the whites, to remain at peace with the Goverment of the United States, and abide by all laws of the same, and obey the orders of the Indian Bureau and the officers acting thereunder, the agreement, as set forth in exhibit "A" attached to the defendant's answer, was made, which is as follows:

[Defendant's Exhibit "A"—Indian Agreement in Council.]

IN COUNCIL AT SPOKANE FALLS, W. T.

August 18th, 1877.

We, the undersigned Chiefs and head men of the Spokane Tribe of Indians for ourselves and our people hereby agree to accept the following described land for our reservation: Beginning at the source of the Chimokan Creek in Washington Territory, thence down said creek to the Spokane River, [53] thence down said River to the Columbia River, thence up the Columbia River to the mouth of Nimchin Creek, thence easterly to the place of beginning,

And we do further agree to go upon the same by the first of November next with the view of establishing our permanent homes thereon and engaging in agricultural pursuits. We hereby renew our friendly relations with the whites and promise to remain at peace with the Government and abide by all laws of

the same, and obey the orders of the Indian Bureau and the officers acting thereunder.

Names of Witnesses:	Names:
E. C. WATKINS, U. S. Indian Inspector.	Whistle-poo-sum his X mark Spokane
	Quis-e-me-ow his X mark Spokane
	Ah-mi-melechin his X mark Spokane
FRANK WHEATON, Bt. Major Gen. U. S. Army, Col. 2nd Infantry,	Cos-to-akan his X mark Spokane
	Ora-pa-han his X mark Spokane
M. C. WILKINSON, Bvt. Capt. U. S. Army, Aide de Camp.	Paul his X mark Ora-pa-ham

That thereafter, and prior to November 14, 1877, and pursuant to the agreement aforesaid, the said E. C. Watkins, Indian Inspector, as aforesaid, acting in his official capacity, located such of the said Spokane Indians as were not already resident thereon upon said Reservation above described, and said Spokane Indians remained upon and continued in use, occupancy, possession and enjoyment of said tract described in said [54] agreement and claimed the same as their reservation continuously thereafter until the year 1910.

That the action of the said E. C. Watkins in locating said Indians upon said reservation was by him

reported to the Commissioner of Indian Affairs on November 14, 1877, and said report was, on January 23d, 1878, in response to a resolution, communicated by the Secretary of the Interior to the United States Senate, and by the Senate referred to the Committee on Indian Affairs and ordered printed.

That about August, 1880, said Indians were much disturbed by the attempts of squatters to locate on land within the limits of said territory so claimed by the said Indians as their reservation, and on the 3d day of September, 1880, for the purpose of carrying out the terms of the agreement entered into at said council, and preserving peace between the Indians and white settlers, Brigadier-General Howard, of the Department of the Columbia, made an order, which is as set forth in exhibit "B" attached to defendant's answer, which reads as follows:

[Defendant's Exhibit "B"—Order Directing Protection of Certain Territory Against Settlement by Others Than Indians.]

HEADQUARTERS DEPARTMENT OF THE COLUMBIA.

In Field, Spokane Falls, W. T.

September 3, 1880.

SPECIAL FIELD ORDERS.

No. 8.

Whereas, in consequence of a promise made in August, 1877, by E. C. Watkins, Inspector of the Interior Department, to set apart, or have set apart, for the use of the Spokane [55] Indians, the following described territory, to wit: Commencing at

the mouth of the Cham-a-kane Creek, thence north eight miles in direction of said creek; thence due west to the Columbia river; thence along the Columbia and Spokane Rivers to the point of beginning—the Indians are still expecting the Executive Order in their case, and are much disturbed by the attempts of squatters to locate land within said limits, it is hereby directed that the above described territory, being still unsurveyed, be protected against settlement by others than said Indians, until the survey shall be made, or until further instructions. This order is based upon plain necessity to preserve the peace until the pledge of the Government shall be fulfilled, or other arrangements accomplished.

The commanding officers of Forts Coeur d'Alene and Colville and Camp Chelan, are charged with the proper execution of this order.

By command of Brigadier-General Howard,

H. H. PIERCE,
1st Lieutenant, 21st Infantry,
Acting Aide-de-Camp.

Official:

H. H. PIERCE,
Acting Aide-de-camp.

That the lands described in exhibit "A" attached to defendant's answer, which include the premises described in the complaint, are embraced within the limits described in the proclamation of the President of the United States, which was, and is, as set forth in exhibit "C" attached to defendant's [56] answer, which reads as follows:

[Defendant's Exhibit "C"—Executive Order Setting Aside and Reserving Certain Lands for Spokane Indians.]

Executive Mansion, January 18, 1881.

It is hereby ordered that the following tract of land situated in Washington Territory be, and the same is hereby, set aside and reserved for the use and occupancy of the Spokane Indians, namely:

Commencing at a point where the Chemakane Creek crosses the forty-eighth parallel of latitude; thence down the east bank of said creek to where it enters the Spokane River; thence across said Spokane river westwardly along the southern bank thereof to a point where it enters the Columbia River; thence across the Columbia River northwardly along its western bank to a point where said river crosses the said forty-eighth parallel of latitude, thence east along said parallel to the place of beginning.

R. B. HAYES.

That on or about April 2, 1910, at the United States Land Office, in the city of Spokane, State of Washington, defendant made homestead entry upon the premises described in the complaint under the Act of Congress approved May 29, 1908 (35 State L. 458), and the proclamation of the order of the President of the United States of May 22, 1909, which entry [57] was duly accepted by the Register and Receiver of said Land Office.

That on April 9, 1913, patent to said land was issued to this defendant, and in virtue of his said entry and the patent thereafter issued to him, defendant

entered into the possessioo of said premises on or about April 2, 1910, and ever since has continued to and now does occupy the same.

That prior to said homestead entry, the plaintiff asserted its claim herein before the General Land Office to the land described in the complaint, and other lands included within the Spokane Indian Reservation, basing its title thereto upon the grant made by the Act of July 2, 1864 (13 Stats. L. 365); but said claim was denied and on appeal decided by the Secretary of the Interior in the words and figures as set out in exhibit "D" attached to defendnat's answer, which reads as follows:

[Defendant's Exhibit "D"—Decision of Secretary of Interior.]

DEPARTMENT OF THE INTERIOR.

926 WASHINGTON. G. B. G.

Mar. 7, 1910.

Commissioner of the General Land Office.

Sir: This is the appeal of the Northern Pacific Railway Company from your office decision of February 15, 1910, denying the claim of said Company to 64,000 acres of land, falling within the place limits of the grant made to said Company by the Act of July 2, 1864 (13 Stat., 365), because of its inclusion within the Spokane Indian Reservation, and holding that said lands are subject to disposition under the Act of May 29, 1908 [58] (35 Stat., 458).

It appears from your said office decision and it is not disputed that in August, 1877, E. C. Watkins, an Indian Inspector of this Department had a conference with the Spokane Indians and set apart or prom-

ised to have set apart for their use a certain tract of land; that on November 26, 1877, said Inspector made a report to the Commissioner of Indian affairs relative to the consolidation of the Indians of Oregon and Washington Territory. In said report he refers to the Colville Indian Reservation, in which the Spokane Indians belonged, and states that he located the Spokane and Palouse Indians north of the Spokane River, giving them a tract about 20 miles square adjoining the Colville Reservation. This tract includes the land in question. In a report dated August 18, 1880, published in the Indian Office, Mr. John A. Sims, United Statees Indian Agent, Colville Agency, Washington, shows that the Spokane Indians numbering 685, "are living along the Spokane River and vicinity from Spokane Falls to its junction with the Columbia," these being the same lands set apart for them by Inspector Watkins; and that the greater number of the Spokane Indians had farms upon which they raised most of their subsistence. On September 3, 1880, H. H. Pierce, First Lieutenant 21st Infantry, by command of Brigadier General Howard, proclaimed in special field order No. 8, Headquarters Department of the Columbia, in the field, Spokane Falls, Washington, a reservation for the Spokane Indians described the lands as given above in the agreement made by Inspector Watkins, and stated in said order that it was for the purpose of protecting the lands against [59] settlement other than by said Indians, until the survey should be made, or until further instructions, and was based upon plain necessity to preserve the peace

until the pledge of the Government should be fulfilled or other arrangements accomplished. The executive order setting apart said Indian Reservation is dated January 18, 1881, and describes the lands practically the same as in said order No. 8.

The definite location of the Northern Pacific Railway's line of road coterminous with and opposite the lands in question, was made October 4, 1880. It thus appeaars that the time at which the Railway Company's claim would ordinarily have attached to said lands they were included in the aforesaid reservation created by the said H. H. Pierce, September 3, 1880, but had not been included within the Executive order setting apart said Indian Reservation January 18, 1881.

Your office decision holds that the negotiations of the said E. C. Watkins, the facts stated in said report of John A. Sims, United States Indian Agent and the order of H. H. Pierce of September 3, 1880, constituted such reservation of this land as prevented the attachment of the railway grant upon definite location. This is complained of upon appeal, but no authorities are cited in support of the appeal, except the case of Buttz v. Northern Pacific Railway Company, 119 U. S. 55, which, it is contended is authority for the contention of the Company that these lands had not been withdrawn prior to January 18, 1881, and that they were therefore subject to the Company's grant October 4, 1880. The case cited is not in point and furnishes no authority for the contention made. [60]

The fact of the negotiations and of the military

order above referred to is not denied upon the appeal, but the legal effect of these proceeding is disputed.

Upon a careful consideration of the subject, it is believed that these proceedings constitute such reservation of the land in question as brought them within the excepting clause of the grant of July 2, 1864.

The decision appealed from is affirmed and your office will proceed to the disposition of these lands in accordance with the provisions of the Act of May 29, 1908, *supra.*

Very respectfully,

Sgd. FRANK PIERCE,

First Assistant Secretary.

Mr. CANNON.—In view of the facts that we have stipulated, the only exhibit that the railway company will offer is Exhibit Number One. The other notices published are the same as this one.

The Notice referred to was marked "Plaintiff's Exhibit 1," and is incorporated in the preceding stipulation.

Mr. CANNON.—I stipulated yesterday that Chief James Bernard, if present in court would testify as set forth in this stipulation.

Mr. GARRECHT.—Well, there are four of them.

Mr. CANNON.—Yes. That said witnessess will testify [61] in relation thereto as follows:

It is admitted that CHIEF JAMES BERNARD, a witness for defendant, now in attendance upon the court would testify upon his oath:

That he is well acquainted with the Spokane Reservation and vicinity since before 1877; that the creek which flows into the Columbia River from the

east side, at a point near Cedonia and about ten miles north of said Reservation, was known among the Indians in 1877 as Nimchin Creek, and its approximate location is indicated on the map, Defendant's Exhibit "E," by the point of the arrow thereon, marked (1).

It is also admitted that CHARLEY ORAPAHAN, a witness for defendant and now in attendance upon the Court, would testify upon his oath:

That he is a son of Chief Orapahan and a nephew of Paul Orapahan, who was a Sub-Chief or Headman of a band of Indians of the Lower Spokane Tribe, and that said CHARLEY ORAPAHAN will testify to the same effect as Chief James Bernard with reference to Nimchin Creek.

It is further admitted that JOHN HILL, a witness for defendant and now in attendance upon the Court, would testify upon his oath that he has resided on the lands included in the Spokane Reservation since 1876 and has been well acquainted with said reservation and vicinity since said time.

It is also admitted that CHARLES HAINES, a witness for defendant and now in attendance upon the Court, would testify upon his oath: [62]

That he lived on what is known as the "Haines Place" on a part of Walker's Prairie, from 1862 until 1900, and at another point on Walker's Prairie since 1900, and that he was well acquainted with the Spokane Reservation and vicinity during all of said times.

It is admitted that all of said witnesses would testify upon oath:

That CHIEF ORAPAHAN, his son CHARLEY

ORAPAHAN, PAUL ORAPAHAN, and other Indians of their band, prior to the month of June, 1879, occupied a portion of said Reservation designated on the map, Defendant's Exhibit "E," by the point of the arrow marked (2); and had small farms there.

That there was a flat of five or six hundred acres on said reservation upon which in 1879 there were a few small Indian farms or gardens at about the place indicated on the map, Defendant's Exhibit "E," by the point of arrow (3).

That each of said witnesses will testify that he was well acquainted with Chief Ahmamelican, and that said chief and his band at said times had about two or three hundred acres of land enclosed on said reservation at about the point indicated on the map, Defendant's Exhibit "E," by the arrow marked (4);

That each of said witnesses will testify that he was well acquainted with Chief Whistlepoosom; that said Chief was also known at Lot, and in the forepart of the year 1879, with his band, occupied and had farms on about eight hundred acres of land on the Spokane Reservation in the vicinity of the place designated on the map, Defendant's Exhibit "E" at the point of the arrow marked (5); [63]

That each of said witnesses will testify that in the month of July, 1879, and for a long time prior thereto, the Haines place at Walker's Prairie was at about the point designated on the map, Defendant's Exhibit "E," at the point of the arrow marked (6);

That the said witnesses, CHIEF JAMES BERNARD, JOHN HILL and CHARLES HAINES, were each well acquainted with James O'Neil, who

was Indian Farmer for the Government in 1879.

That each of said witnesses, CHIEF JAMES BERNARD, CHARLEY ORAPAHAN, JOHN HILL and CHARLES HAINES, will further testify on oath that in 1879 said chiefs and bands residing upon and occupying said lands as aforesaid, together with other Indians were claiming as their reservation the territory embraced in the following description:

Beginning at the source of the Chimokane Creek, in Washington Territory, thence down said creek to the Spokane River, thence down said river to the Columbia River, thence up the Columbia River to the mouth of Nimchin Creek, thence easterly to the place of beginning.

Mr. CANNON.—It may be stipulated that the Spokane Indian Reservation Map may be introduced in evidence as part of the defendant's case, and that the markings thereon placed are correct.

Said map was marked "Defendant's Exhibit E" and is hereto attached.

Mr. CANNON.—I think that is all we have got, isn't it?

Mr. GARRECHT.—I have some exhibits. [64]

Mr. GARRECHT.—I offer in evidence report of Commissioner of Indian Affairs for the year 1878, and particularly the following excerpt from page 58, the land division.

Mr. CANNON.—That is objected to as incompetent, irrelevant and immaterial.

The COURT.—I think that will be a question of law. The objection is overruled.

Plaintiff excepts and exception allowed. Said report is marked Defendant's Exhibit "F."

Said excerpt is as follows:

[Defendant's Exhibit "F"—Excerpt from Report of Commissioner of Indian Affairs.]

THE LAND DIVISION.

This division has charge of all the Indian lands in the United States and is the law division of the office.

LANDS.

Indian Reservations are created and their boundaries defined in four different modes:

First. By treaties, conventions and agreements with the various tribes;

Second. By Acts of Congress;

Third. By Executive Orders;

Fourth. By order of the Secretary of the Interior.

Mr. GARRECHT.—I offer in evidence a certified copy of a letter of May 7th, 1877, from the Indian Commissioner to Colonel E. C. Watkins, U. S. Indian Inspector, San Francisco, California. [65]

The COURT.—That is the letter under which he was acting?

Mr. GARRECHT.—The letter under which he was acting; and particularly the following excerpts:

Mr. CANNON.—I make the same objection to that; incompetent, irrelevant and immaterial.

The COURT.—It will be admitted.

Plaintiff excepts and exception allowed. Said letter was marked "Defendant's Exhibit G."

[Excerpt from Letter, dated May 7, 1877, from Indian Commissioner to Indian Inspector.]

The excerpt therefrom, reads as follows:

Sir:

Upon completing the duty assigned you in California, you are hereby directed to proceed to inspect the Nez Perce Agency in Idaho. * * *

From the Nez Perce Agency you will proceed upon a tour of inspection, which shall include the remaining agencies in Idaho, and all the agencies in Washington Territory and Oregon, visiting the agencies in such order as you shall deem most advantageous and most economical of time and expense. * * *

Scattered through the state and territories to be visited—especially on the Columbia River and in the Northern part of Idaho—are various bands of roving Indians whose uncontrolled presence in a country fast settling up is a source of annoyace and danger. Your special attention will be given to the subject of gathering these Indians upon permanent reservations. * * *

Such Indians should be made distinctly to understand [66] that their absence from their reservations as vagabonds will no longer be permitted by the Government, and such an understanding should be established between yourself, the respective agents and General Howard as will ensure the fulfillment of the demands made upon the Indians.

Mr. GARRECHT.—Then I offer a certified copy of the record of the council that was held with those Indians, August 16th, 17th and 18th, 1877, and particularly the following excerpts:

Mr. CANNON.—I make the same objection; incompetent, irrelevant and immaterial.

The COURT.—It will be admitted.

Plaintiff excepts and exception allowed. Said paper was marked Defendant's Exhibit "H."

[Defendant's Exhibit "H"—Excerpts from Record of Council Held With Indians on August 16–18, 1877.]

Said excerpts read as follows:

Col. Watkins: Have come to meet you from Washington, but by reason of the outbreak of the Non-treaty Nez Perces have not heretofore been able to do so.

General Wheaton commanding the troops and Captain Wilkinson of the staff of General Howard will represent General Howard and the Army. We want to find out the feeling of the Indians here towards the whites. Some Indians have been roaming over the country. The policy of the Government is to place Indians on reservations. * * *

I will say a few words. I visit all the Indians [67] in the United States, give them advice, find out what they want, make recommendations, come as their friend to tell them what is best for them. I am not here to work for white men. The commissioner of Indian Affairs, Sec'ty of the Interior, President of the United States, have all decided that it is best for all Indians to go upon reservations. The President of the United States gives the Indians more land than he does the white man. White men can take up and hold 160 acres of land, but the Indians can have much more. The reserve proposed for the

Spokanes gives to each Indian more land. (Describes the proposed new reserve.) If I did not think it was a good reserve in every particular, I would not urge it upon you. * * *

I will add that if you will locate upon reservations, you will receive implements &c. after I find out where you will go. I will tell you what I will get for you.

Whistle-poosam: I am willing to go where you want me.

Ora-pa-han: I am well pleased about this Council. I like roots but I like what the ploughs bring. I am pleased with the country you have given us and my heart is laughing; that the reason why I'm talking. That's what I tell my people to take the ploughs, but the white people tell them they can't have the country and so they stop. Now I have a good many Children listening to you today, now I can tell them to take **[68]** the plough & go to work, now my people can build houses, split rails and have homes. I can stay by my old graves and be buried there.

Col. Watkins: Explains again fully the wishes of the government in regard to Indians either going upon reservations in order to secure homes upon them, or becoming Citizens, no matter only so they get homes, and stop roaming. * * *

Col. Watkins: Glad to hear what has been said and hope you and your people are satisfied with your reservation.

Ans. Am well pleased with our reservation. When you put our Indians on the reservation want

soldiers to watch between them and the whites.

Col. Watkins: Again explain at length what it means to become a Citizen, the absolute necessity for Indians to get title to land they occupy or go upon reservation and the impossibility of giving them *all* the Country, that as it is they have more than the allowance to a white man (160 acres) and that some of the Indians must move as they can't all be included in the lines of the reservations.

Kin-kin-no-wah Colville: I want you to build a Post (Military) to look after the whites and the Indians. I want the whites away from me.

Captain Wilkinson spoke of the relative control of the War and Interior Departments.

Ah-mi Melican, Lower Spokane: This is not the first time the whites have talked to me as you have. I believe what you all have said. **[69]** I want to get farms.

Cos-te-Akan: I think it best for me to go on the reservation. I will study and see. Will you buy my farm?

Gen. Wheaton: No government officer moves with out his orders; he will be kind and thoughtful to all who obey his law, and his hand will be heavy upon those who do not. The officers all hope that the instructions of Col. Watkins will be obeyed. Do as you have been instructed by the Inspector and all will be well.

Excerpts from Report of Col. Watkins, Dated Lewiston, Idaho, August 23, 1877.

General Howard thought it would be well to send a force of troops through the country—with an ob-

jective point beyond—nominally, to co-operate with the columns following the hostiles, in the direction of Montana,—*really,* by a show of military strength, to produce a moral effect on the Indians,—restore confidence to the citizens, and co-operate with the Indian management, in the interest of peace.

I fully concurred in the advisability of this movement, and I think the result has been very beneficial. Gen. F. Wheaton, was placed in command of the column, with instructions to march via the Spokane River, and Coeur d'Alene mission,—with Missoula, Montana, as the objective point:—to co-operate with myself,—as the representative of the Indian office,—in preventing hostilities, &c., among these Northern tribes. Capt. Wilkinson of his, Gen. Howard's staff, was directed to accompany the column, and also co-operate with me. * * *

But after much talk, and full description of the country, **[70]** given by White men, and Indians familiar with it, I decided to recommend that a piece of land lying north of the Spokane, near its mouth, —about twenty miles square, be set apart for the Spokane Palouse, and other roaming Indians of the vicinity.

The description is as follows:

Beginning at the mouth of the Nomchin Creek, thence easterly to the source of the Chamokane Creek, thence down to Chamokane to the Spokane river, thence down the Spokane river to the Columbia, thence up the Columbia to the place of beginning.

There are no white settlers living on this tract,

and it is a central point for the Indians—proposed to be placed on it,—adjacent to the present Colville reserve and forming the proposed addition,—and a suitable place for a permanent Indian reserve. It has natural boundaries,—is not large,—but has a fair proportion of arable land—enough to furnish a farm to every Indian—and is entirely satisfactory to the Lower Spokanes, and many of the Upper band —and the Palouse Indians.

All these gave me their written promise to remove to this location by the 1st of November next. (I enclose the agreement with this report.)

This covers all the roving Indians below the Spokane, and includes the greater portion of the Spokane Tribe. * * *

I also wish to express my objection to Gen. Wheaton, and the officers of his command, for their hearty co-operation, and the many courtesies extended to me personally.

Capt. Wilkinson of General Howard's staff, was with me [71] during the entire trip, working with energy and ability to secure the end desired, and accomplished. He is keeping a full record for the information of Gen. Howard, and will accompany me to other reservations. I file herewith, record of the proceedings in council, as taken in abbreviated and condensed form by Capt. Wilkinson. * * *

I also enclose agreements signed by the Indians. * * *

Recapitulation of Recommendations.

3d. That the following described tract be set

apart for the use of the Spokane Indians, and Palouse band.

Beginning at the mouth of the Nomchin Creek, thence easterly to the source or head waters of the Chamocum Creek, thence down the Chanocum to the Spokane River, thence down the Spokane to the Columbia, thence up the Columbia to the place of beginning.

Mr. GARRECHT.—I offer a certified copy of a letter dated Spokane Falls, Washington Territory, August 18th, 1877, from E. C. Watkins, Inspector, addressed to General O. O. Howard, commanding department. The papers hereto attached are excerpts.

Mr. CANNON.—I make the same objection; incompetent, irrelevant and immaterial.

The COURT.—It will be admitted.

Plaintiff excepts and exception allowed. Said paper was marked "Defendant's Exhibit I."

[Defendant's Exhibit "I"—Excerpt from Letter, Dated August 18, 1877, from Inspector Watkins to General Howard.]

Said excerpt is as follows:

Dear General:

We have just closed our council with the Indians [72] of the various tribes of the North. * * *

The Indians present all expressed their friendly feeling towards the whites and promised to go upon the reservation I have decided to recommend and upon those already established. I send you a copy of the agreement signed by the Indians. A good feeling prevails and the Indians promised obedience.

(Attached to this letter are four distinct agreements with Indians. One with the Colville, Okanogan and Lake Bands; with the Colville band of Pend O'Reille; with the Palouse tribe and one with the Spokane Tribe, which last is identical with exhibit "A" attached to complaint.)

Mr. GARRECHT.—Next a certified copy of a letter dated August 18th, 1877, from Col. Frank Wheaton to General Howard, and particularly the following excerpts:

Mr. CANNON.—I make the same objection; incompetent, irrelevant and immaterial.

The COURT.—The same ruling.

Plaintiff excepts and exception allowed. Said letter was marked "Defendant's Exhibit J."

[Defendant's Exhibit "J"—Excerpts from Letter Dated August 18, 1877, from Col. Wheaton to General Horace.]

The excerpts from said letter read as follows:

General:

* * * This command arrived here on the 10th instant, the day designated by Indian Inspector Watkins for the assembling of the chiefs and headman of the various tribes located in this region * * * Colonel Watkins and your aide, Captain Wilkinson, came with me to this point. * * * Inspector [73] Watkins found it impossible to assemble the council of Chiefs until the 16th, this delay was necessary and advantageous as affording the best disposed Indians of influence an opportunity to bring disaffected Indians, particularly of the Spokane tribe, to more correct understanding of

the Government's requirements. I think they all understand now that all Indians in your department will be compelled to elect either to become citizens of the United States or go upon distinct reservations. * * *

The Coeur d'Alenes, Colvilles, Okanogans, Pend O'Reilles, Lower Spokanes, Kalispells and the small band of Palouse seem to be satisfactorily located, and I doubt if through any act of theirs any trouble will be made in your Department—as settlements increase near the reservations for the above-named Indians conflicts with citizens must be expected.

Mr. GARRECHT.—Next, a certified copy of a telegram from Wilkinson, Aide, dated August 23d, 1877.

Mr. CANNON.—I make the same objection; incompetent, irrelevant and immaterial.

The COURT.—The same ruling.

Plaintiff excepts and exception allowed. Said telegram was marked "Defendant's Exhibit K," and is as follows:

[Defendant's Exhibit "K"—Telegram Dated August 23, 1877, from Wilkinson to Captain Sladen.]

To Captain Sladen, Aide-de-Camp,

Headquarters, Portland, Oregon.

Just returned from Spokane Falls. Wheaton's Column due here Monday—Council with Northern Indians successful. [74] Inspector Watkins has written agreements with Chiefs to go on reservations. Kind feelings expressed by Indians. Send

communications to me to Dalles.

Wilkinson, Aide.

Mr. GARRECHT.—Next is a certified copy of the Report of Indian Inspector Watkins, dated at Washington, D. C., November 26th, 1877.

The COURT.—That is the same report that was offered before, is it not?

Mr. GARRECHT.—Yes, your Honor; but I wanted particularly the letter thereto attached, dated December 29, 1877, signed by E. A. Hayt, Commissioner, showing general approval of the report by the Commissioner.

Mr. CANNON.—I will make the same objection; incompetent, irrelevant and immaterial.

The COURT.—Same ruling.

Plaintiff excepts and exception allowed. Said report was marked "Defendant's Exhibit L."

[Exhibit "L"—Letter, Dated December 29, 1877, Commissioner to Secretary of Interior.]

The letter referred to is as follows:

DEPARTMENT OF THE INTERIOR.
OFFICE OF INDIAN AFFAIRS.

Washington, Dec. 29, 1877.

The Honorable, The Secretary of the Interior,

Sir: I have the honor to submit herewith a report by Inspector E. C. Watkins on the consolidation of the Indians [75] of Oregon and Washington Territory, together with letters of G. A. Henry, Special Indian Agent. I concur in the recommendations of the Inspector, but think his estimate of the expense of such consolidation is entirely too high. I

would like to see the proposed plan adopted, with the least delay possible.

Very respectfully your obd't servant,

E. A. HAYT,
Commissioner.

Mr. GARRECHT.—I offer a certified copy of a letter of September 1st, 1880, from the War Department to the Secretary of the Interior, enclosing a telegram of General Howard; telegram dated August 21, 1880; and certified copy of a letter of O. O. Howard, Brigadier General, to Colonel Frank Wheaton, Fort Coeur d'Alene, dated September 5th, 1880, which enclosed a copy of Field Order No. 8; also a certified copy of a letter from Secretary of War to the Secretary of the Interior dated January 15th, 1881, enclosing a requested description of the Howard map.

Said paper was marked "Defendant's Exhibit M."

Mr. CANNON.—I make the same objection; incompetent, irrelevant and immaterial.

The COURT.—The same ruling.

Plaintiff excepts and exception allowed

Said letters and excerpts read as follows: [76]

[Defendant's Exhibit "M"—Letter, Dated September 1, 1880, from War Department to Secretary of Interior, etc.]

WAR DEPARTMENT.
Washington City.
September 1st, 1880.

Sir: I have the honor to invite your attention to the enclosed copy of a dispatch from the Commanding General Department of the Columbia, dated the

31st ultimo, representing that white settlements are beginning on unsurveyed land claimed by Spokane Indians between Chamakine Creek and the Columbia River, and requesting that authority be obtained to declare a straight eight miles broad temporarily withdrawn from settlement, at least until surveyed.

Very respectfully,

H. T. CROSBY,
Chief Clerk,
For the Secretary of War, in his absence.

To Honorable, The Secretary of the Interior. [77]

(Enclosure)

THE WESTERN UNION TELEGRAPH COMPANY.

Dated Spokane Falls, W. T., August 31, 1880.

Received at Cor. 15th & "F" Streets, Washington, D. C., 1:56 P. M.

To: Adj. Genl. U. S. Army, Washn, D. C.

White settlements are beginning on unsurveyed land claimed by Spokane Indians between Chamakine Creek and the Columbia along the Spokane River please get me authority from the President or Secy of Interior to declare a straight eight miles broad temporarily withdrawn from settlement at least until surveyed I ask this on military grounds to prevent outbreak and complications as the Indians will take homesteads if time and protection are given answer desired tomorrow if possible.

HOWARD,
Comdg. Dept. [78]

Sir: Enclosed please find an order relating to a small reservation which Col. E. C. Watkins

promised to certain Spokane Indians. The order explains itself. I have visited the several bands of Spokanes, first those of Deep Creek, where they are taking land in severalty;—Second, on the said Watkins' reservation * * * off the said reservation, I regard it important that surveys be speedily made and that all possible Indians be aided by encouragement and advice to take up lands as white men under the Indian homestead law. Others should be free to go on the Watkins reservation, or any other as they may elect. * * *

What we wish particularly is, that measures should tend toward an ultimate peaceable solution of all questions that affect these Indians. The Secretary of the Interior has asked our co-operation and expressed himself as grateful for promised aid. [79]

(Enclosure)

MILITARY ORDER

Headq'rs. Dept. of the Columbia,
In the Field, Spokane Falls, W. T.
September 3, 1880.

(FIELD ORDER NO. 8)

WHEREAS, in consequence of a promise made in August, 1877, by E. C. Watkins, Inspector of the Interior Department, to set apart, or have set apart, for the use of the Spokane Indians, the following described territory, to wit:

Commencing at the mouth of Cham-a-kane creek, thence north eight miles in direction of said creek, thence due west to the Columbia River, thence along the Columbia and Spokane rivers to the point of

beginning—the Indians are still expecting the Executive Order in their case, and are much disturbed by the attempts of squatters to locate land within said limits, it is hereby directed that the above described territory, being still unsurveyed, be protected against settlement by other than said Indians until the survey shall be made, or until further instructions. This order is based upon plain necessity to preserve the peace until the pledge of the Government shall be fulfilled, or other arrangements accomplished.

The commanding officers of Forts Coeur d'Alene and Colville, and Camp Chelan are charged with the proper execution of this order.

By command of Brigadier General Howard,

H. H. PIERCE,

Official. 1st Lieut., 21st Infantry,

Acting Aid-de-Camp. [80]

January 15, '81.

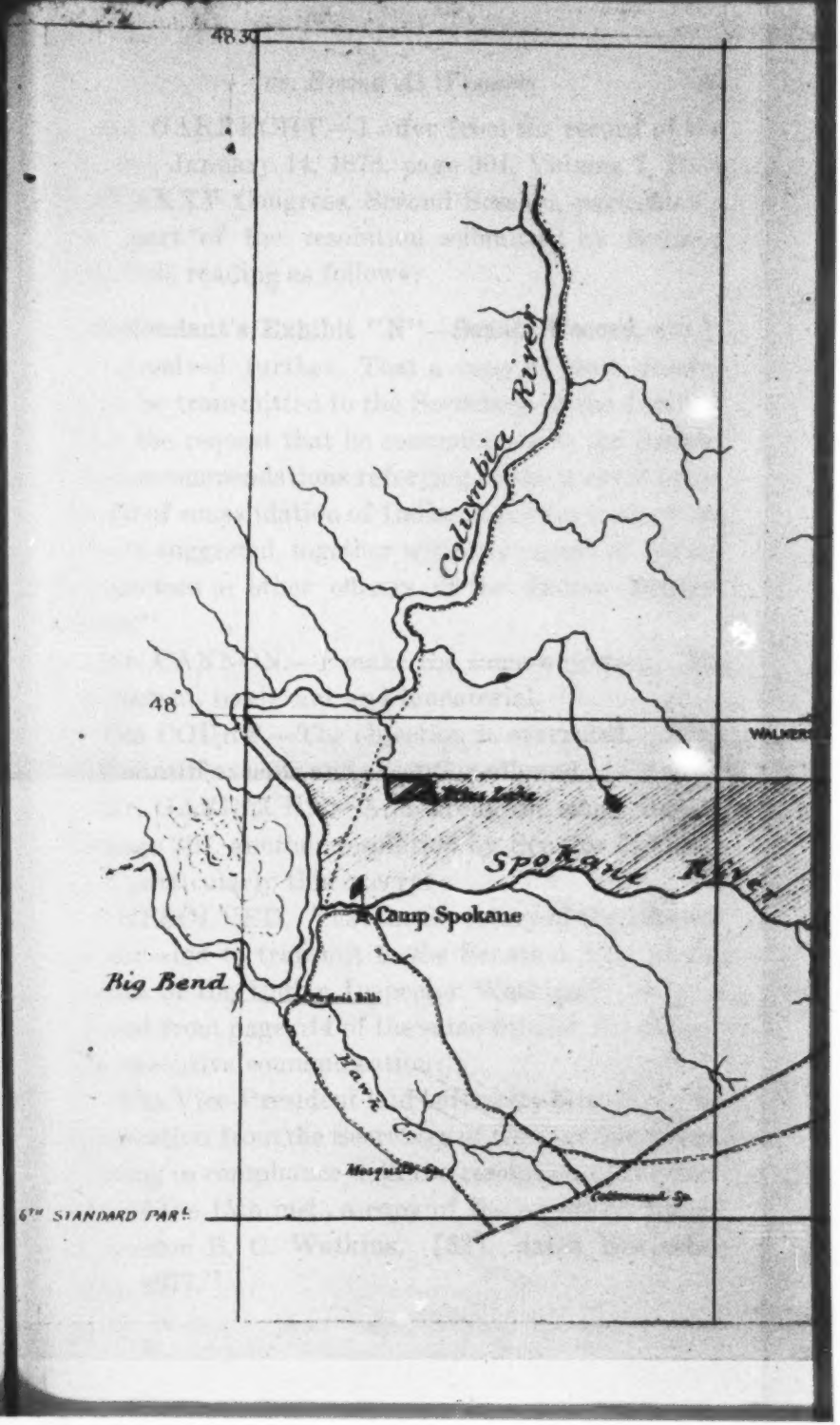
Sir: I have the honor to ackuowledge the receipt of your letter dated the 7th of September, last, enclosing one from the Commissioner of Indian Affairs, in reply to letter from this Department transmitting copy of a telegram from General Howard, dated Spokane Falls, W. T., August 31st, last, in which he states that "White settlements are beginning on unsurveyed lands claimed by Spokane Indians between Chamakine Creek and the Columbia along Spokane River, and asking authority from the President to declare a *straight* eight miles broad temporarily withdrawn from settlement.

In reply to your request that General Howard be

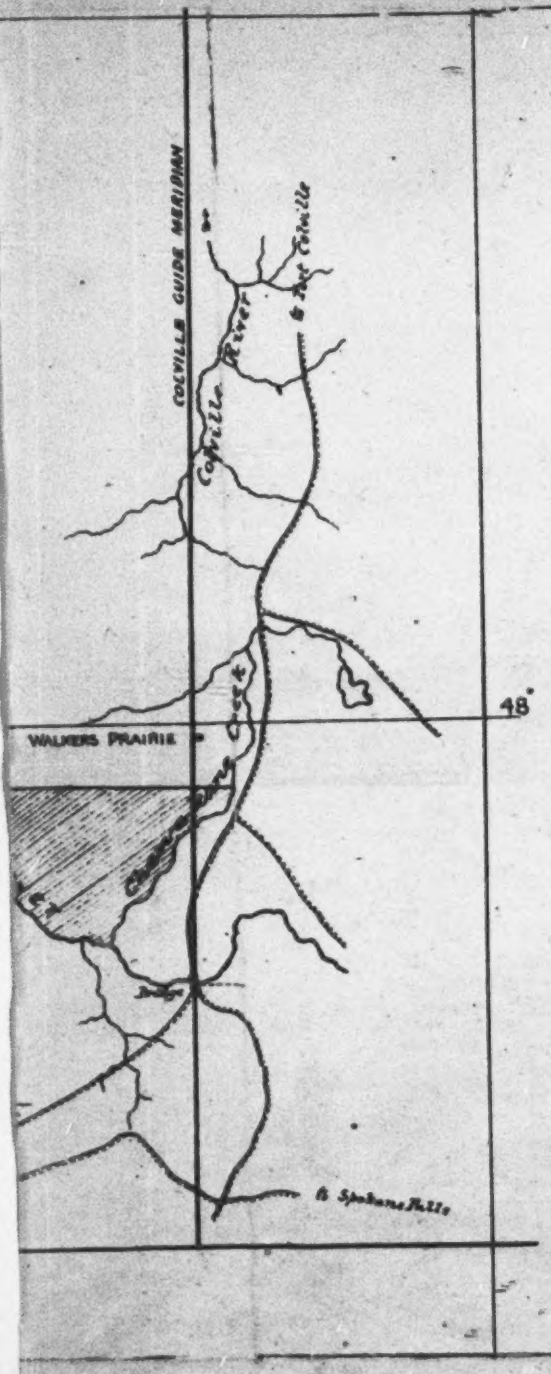
instructed to forward a description by natural objects of the tract of country which he desires reserved for the protection of said Indians, I beg to enclose herewith a description and plat of the lands referred to.

Very respectfully,
Your obedient servant,
ALEX. RAMSEY,
Secretary of War.

The Honorable, The Secretary of the Interior. [81]


48 30
Columbia River
48°
WALKER
Spokane River
Camp Spokane
Big Bend
Hawk Cr.
Mosquito Sp.
6TH STANDARD PAR.

82



MAP

SHOWING TERRITORY SET APART, FOR USE OF THE SPOKANE INDIANS,

In accordance with Special Field Order

N°8 of Sep 3. 1880

Scale 8 miles = 1 inch

Northern boundary - a due East & West line through the mouth of Ettas Lake terminating in the Columbia River and Cham-a-kane Creek on the West & East respectively. The Eastern boundary is Cham-a-kane Creek. The Southern boundary is Cham-a-kane Creek & Spokane River. The Western boundary is the Columbia River.

In Ex. Order Jan. 1 1881 - 720 acres 1886.

Mr. GARRECHT.—I offer from the record of the Senate, January 14, 1878, page 304, Volume 7, Part 1, XXXXV Congress, Second Session, particularly the part of the resolution submitted by Senator Mitchell, reading as follows:

[Defendant's Exhibit "N"—Senate Record, etc.]

"Resolved further, That a copy of these resolutions be transmitted to the Secretary of the Interior with the request that he communicate to the Senate, such recommendations referring to the general propsition of consolidation of Indian Agencies in the form herein suggested, together with any report of Indian Inspectors or other officers of the Indian Department."

Mr. CANNON.—I make the same objection. Incompetent, irrelevant and immaterial.

The COURT.—The objection is overruled.

Plaintiff excepts and exception allowed.

Mr. GARRECHT.—And from the same volume at page 327, another resolution by Senator Mitchell, and particularly this excerpt:

"RESOLVED, That the Secretary of the Interior be directed to transmit to the Senate a copy of the report of the Indian Inspector Watkins."

And from page 514 of the same volume, the following executive communication:

"The Vice-President laid before the Senate a communication from the Secretary of the Interior, transmitting in compliance with the resolution of the Senate, of the 15th inst., a copy of the report of Indian Inspector E. C. Watkins, [83] dated November 26th, 1877."

Mr. CANNON.—These are objected to on the same grounds.

The COURT.—They are going in just for the convenience of the Court. It is a public document of which the Court would take judicial notice in any event.

Plaintiff excepts and exception allowed.

Mr. GARRECHT.—And then Senate Executive Document Number 20, XXXXV Congress, Second Session, which purports to have been printed as the result of the resolutions referred to; particularly directing attention to the following excerpt:

"The Spokanes and Palouse, I located north of the mouth of the Spokane River, giving them a tract about 20 miles square adjoining the Colville Reservation. Both of these tracts are described in my report of the conference held with those Indians, and both were recommended to be set apart for their use."

And also the letter in printed form of E. A. Hayt, Commissioner, on page 8, approving the report.

Said Senate Record was marked "Defendant's Exhibit N."

Mr. GARRECHT.—I will offer in evidence an official publication of Executive Orders relating to Indian Reserves from May 14, 1855 to July 1st, 1902, particularly page 134, relating to the Spokane Reserve, and the Executive Order right under it. I want both of those.

Mr. CANNON.—I make the same objection. [84]

The COURT.—Same ruling.

Plaintiff excepts and exception allowed. Said Book was marked "Defendant's Exhibit O."

[Defendant's Exhibit "O" — Order Directing Protection of Certain Territory Against Settlement by Other Than Indians, etc.]

The items offered read as follows:

SPOKANE RESERVE.

(Special Field Orders No. 8)

Headquarters, Department of the Columbia
In the Field, Spokane Falls, Wash.,
September 3rd, 1880.

Whereas in consequence of a promise made in August, 1877, by E. C. Watkins, Inspector of the Interior Department, to set apart, or have set apart, for the use of the Spokane Indians, the following described territory, to wit: Commencing at the mouth of Cham-a-kane Creek, thence north 8 miles in direction of said creek, thence due west to the Columbia River, thence along the Columbia and Spokane Rivers to the point of beginning—the Indians are still expecting the Executive order in their case, and are much disturbed by the attempts of squatters to locate land within said limits. It is hereby directed that the above-described territory, being still unsurveyed, be protected against settlement by other than said Indians, until the survey shall be made, or until further instructions. This order is based upon plain necessity to preserve the peace until the pledge of the Government shall be fulfilled, or other arrangements accomplished.

The Commanding officers of Forts Coeur d'Alene and Colville, and Camp Chelan are charged with the proper execution [85] of this order.

87

By command of Brigadier-General Howard.

H. H. PIERCE,

First Lieutenant, Twenty-first Infantry, Acting Aide-de-Camp.

Executive Mansion, January 18, 1881.

It is hereby ordered that the following tract of land, situated in Washington Territory, be, and the same is hereby, set aside and reserved for the use and occupancy of the Spokane Indians, namely: Commencing at a point where Chemekane Creek crosses the forty-eighth parallel of latitude; thence down the east bank of said creek to where it enters the Spokane River; thence across said Spokane River westwardly, along the southern bank thereof, to a point where it enters the Columbia river; thence across the Columbia, northwardly along its western bank to a point where said river crosses the said forty-eighth parallel of latitude; thence east along said parallel to the place of beginning.

R. B. HAYES.

Mr. GARRECHT.—I want to call attention to certain statutes in the record relating to Spokane Indian Reservation, Volume 32, at pages 266, 575, 742, 744; Volume 33, page 1006; Volume 34, pages 377, 654; Volume 35, pages 19, 458, 813; Volume 36, page 2495. Also to the first Kappler [86] Indian Affairs, Laws and Treaties, pages 754, 799, 924 and 925.

Mr. CANNON.—I object to that. I don't know what it is.

The COURT.—I don't either, but these are historical matters of which I suppose the Court would take judicial notice anyhow. They are a matter of con-

venience to the Court.

Mr. CANNON.—I don't care about objecting to the statutes, but I will preserve the objection because I don't know what it is.

Mr. GARRECHT.—I want to offer in evidence a deed from the United States of America, to Isabel Moses, an Indian allottee, to show the form of these deeds to an odd section of land. Part of my defense is that this was a political question governed entirely by the executive department. I wish to substitute a copy for the original in the record.

Mr. CANNON.—Then this is really for our enlightenment, I suppose. It doesn't involve the land in question but is merely a sample of the deed.

Mr. GARRECHT.—Yes, of certain odd sections in the reservation.

The COURT.—The form of deed given for land in that reservation.

Mr. GARRECHT.—Yes.

Mr. CANNON.—I make the same objection.

The COURT.—It will be admitted.

Plaintiff excepts and exception allowed. Said Deed was marked "Defendant's [87] Exhibit P" and a copy thereof reads as follows:

[Defendant's Exhibit "P"—Allotment to Isabel Moses.]

SUBSTITUTED FOR DEFENDANT'S EXHIBIT "P"

THE UNITED STATES OF AMERICA,

To all to whom these presents shall come, Greeting:

WHEREAS, There has been deposited in the General Land Office of the United States a schedule of

allotments approved by the Secretary of the Interior July 28, 1909, whereby it appears that ISABEL MOSES, an Indian of the Spokane tribe or band has been allotted the following described land:

The North half of the northwest quarter and the northwest quarter of the northeast quarter of section thirteen in Township twenty-eight north of Range thirty-nine east of the Willamette Meridian, Washington, containing one hundred and twenty acres,

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, has allotted, and by these presents does allot, unto the said Isabel Moses, the land above described, and hereby declares that it does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Indian, and at the expiration of said period the United States will convey the same by patent to said Indian, in fee, discharged of said trust and free from all charge and incumbrance whatsoever, if said Indian does not die before the expiration of the said trust period; but in the event said Indian does die before the expiration of said trust period, the Secretary of the Interior shall ascertain the legal heirs of [88] said Indian and either issue to them in their names a patent in fee for said land, or cause said land to be sold for the benefit of said heirs as provided by law. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

IN TESTIMONY WHEREOF, I, William H. Taft, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the TWENTY-FOURTH day of JANUARY, in the year of our Lord one thousand nine hundred and TEN, and of the Independence of the United States the one hundred and THIRTY-FOURTH.

By the President: WM. H. TAFT,
By M. W. YOUNG,
Secretary
H. W. SANFORD,
Recorder of the General Land Office [89]

Mr. GARRECHT.—I am going to offer in evidence the report of the Commissioner of Indian Affairs for 1879, page 143, and particularly the part indicated by pencil brackets on page 143.

Mr. CANNON.—That is subject to the same objection.

The COURT.—It will be admitted.

Plaintiff excepts and exception allowed. Said Report was marked "Defendant's Exhibit Q."

[Defendant's Exhibit "Q"—Excerpt from Report of Commissioner of Indian Affairs for 1879.]

The portion particularly offered reads as follows: Quil-lo-asket himself, with a stove-pipe hat and blace overcoat with cape on, driving. From here we went to Pascal's, another good farm of about 80 acres, with log dwelling and barn and a good Eastern-made wagon. A few calves in a pen, around

which were some fine-looking cows that the Indians were milking.

From Pascal's to Charley's place. Charley has rather more land fenced in than Pascal, part of which is cultivated for wheat and garden, and the balance used for hay, of which he cuts three or four tons. Charley prides himself upon his vegetables. He showed me beans and two kinds of pease, small and marrowfat, of last year's raising. His irrigating ditch, after using for his land, he runs down to the bank of the Columbia, where it is used by Chinese miners in gold washing, for which they pay Charley $5 per month. A short distance below Charley's house, on the bank of the river, with the help of only his own people, they have erected a neat little church (log) and a small cabin for the fathers' use when visiting them. [90]

After leaving Charley's place we intended going to *old* Charley's, but in some manner lost the trail and were compelled to camp that night in a low muddy place, and where there was but little feed for our animals. In the morning early left, and after a ride of five or six miles came to Ore-poken's one of the Spokanes. From his place we visited the farm of his son; then on over the hills some three or four miles to the trail leading down the mountain to the Spokane River. We here struck a most beautiful flat of 500 or 600 acres, in which there were two or three small Indian farms or gardens of only three or four acres each. From here up the Spokane the traveling was bad and dangerous. We had many streams to cross leading from the mountains to the

river, deep and rapid, and one very bad landslide to pass over. We were glad when we again commenced ascending the mountain—a long, steep, and sandy trail. From the summit, a ride of five or six miles, through a fine grazing and wheat-producing country of thousands of acres, with two or three permanent little streams running through it, brought us to the farm or farms of Ah-ma-melican, and a mile from there to Whistle-poo-sum's band and farms. At Ah-ma-melican camp there are between 200 and three hundred acres inclosed, with probably 150 acres cultivated, and Whistle-poo-sum has, I should judge, nearly 800 acres inclosed. Within the inclosure are the different farms, not to exceed, however, 200 acres in cultivation. The land was so wet and miry that it was impossible to give it a thorough investigation. But little was doing excepting the repairing of the fencing. They were soon in hopes of getting in their wheat. Whistle-poo-sum had no seed wheat. I told him to send [91] to the agency after some.

After leaving this place, a ride of about eight miles through the timber brought us to Haine's, at Walker's Prairie.

Mr. GARRECHT.—There is one thing where, through inadvertence, I made a mistake in Paragraph XIV of my answer, which I wish to correct by striking the words "H. H. Pierce, First Lieutenant of the Twenty-first Infantry of the United States Army, by Command of." This order was issued by Brigadier-General Howard. It is just a formal matter. I have got it as if it was an order by the Lieutenant.

The COURT.—You may make the necessary amendment.

Mr. GARRECHT.—You have no objection to that?

Mr. CANNON.—Oh, no. I don't make any point on that at all.

Mr. GARRECHT.—I offer in evidence statistics which appear in the report of the Indian Commissioners for 1880, on pages 270 and 271; the statistics of the number of acres cultivated during the year by the Indians and so forth, which includes the Spokanes; those that I have checked with a little check mark, I would like to have put in the record.

The COURT.—They will be admitted for what they are worth.

The portion particularly offered reads as follows:

[Excerpt from Report of Indian Commissioners for 1880, etc.]

COLVILLE AGENCY.

Coeur d'Alene, Spokane, Colville, Lake, Calispel, O'Kinakane, San Poel, and Methow.

Number of acres cultivated during the year by Indians	3,400
Number of acres broken during the year by Indians	1,000

[92]

Bushels of Wheat	18,000
Bushels of Corn	500
Bushels of Oats and Barley	17,000
Bushels of Vegetables	4,150
Tons of Hay Cut	150
Feet of Lumber sawed	60,000
Cords of Wood cut	2,500

Rods of fencing made..... 2,000
Value of Robes and Furs sold..... 500
Horses..... 5,000
Mules..... 8
Cattle..... 2,500
Swine..... 250

Mr. GARRECHT.—I also offer from the report on Indian Affairs for 1881, from page 160, the following:

The following table is an exhibit of industries among the Spokanes, and the number of domestic animals owned by them:

Number of farmers..... 75
Number of squared log houses..... 8
Number of round log houses..... 58
Number of log barns..... 9
Number of log stables..... 43
Number of granaries and storehouses... 26
Number of acres of wheat planted 587
Number of acres of oats planted.....294
[93]
Number of acres of corn planted..... 10
Number of acres of potatoes planted 23
Number of acres of turnips planted..... 4
Number of acres of onions planted..... 6
Number of acres of beans planted..... 3

They have large gardens of vegetables adapted to this climate, and melons and pumpkins in quantities.

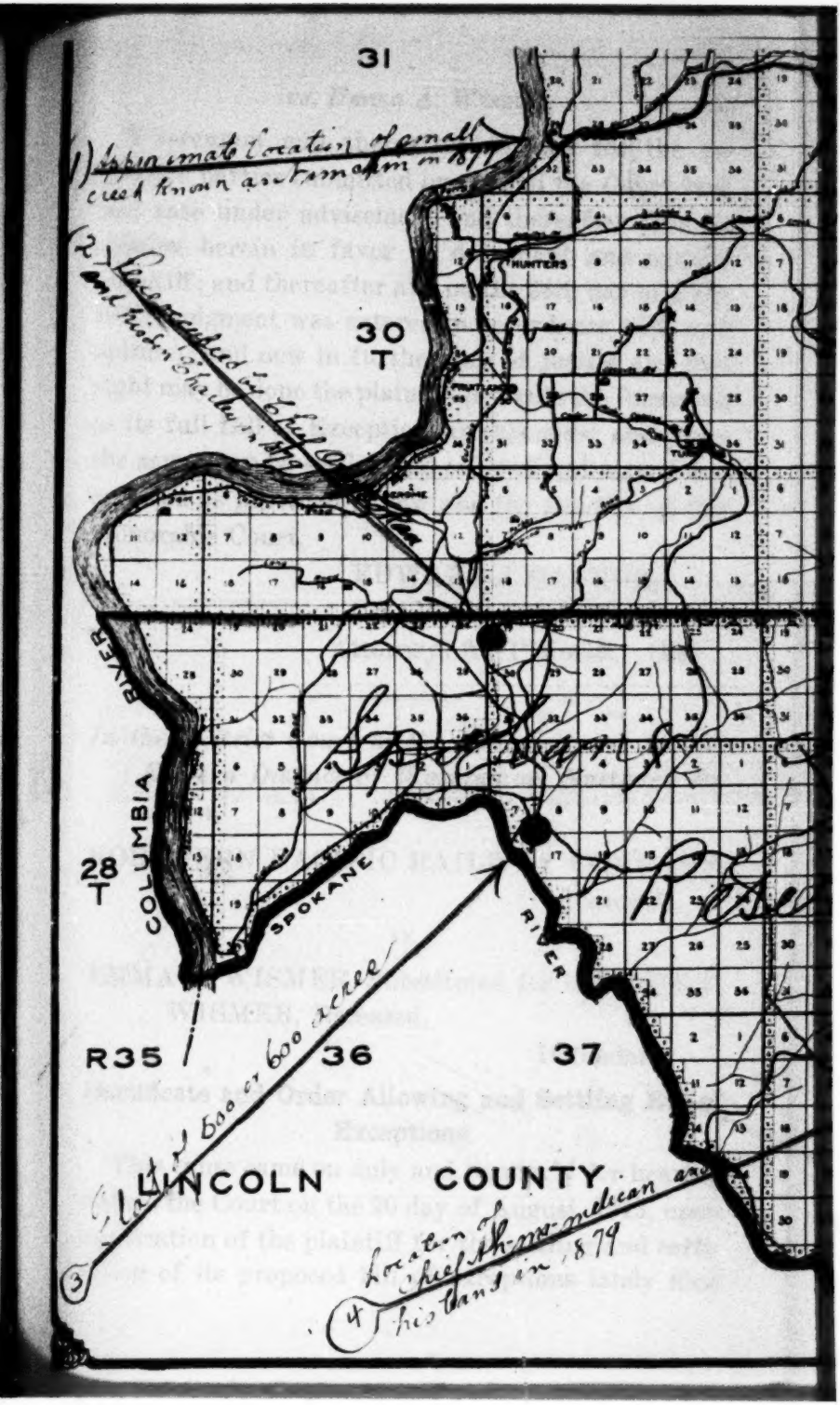
Domestic Animals.

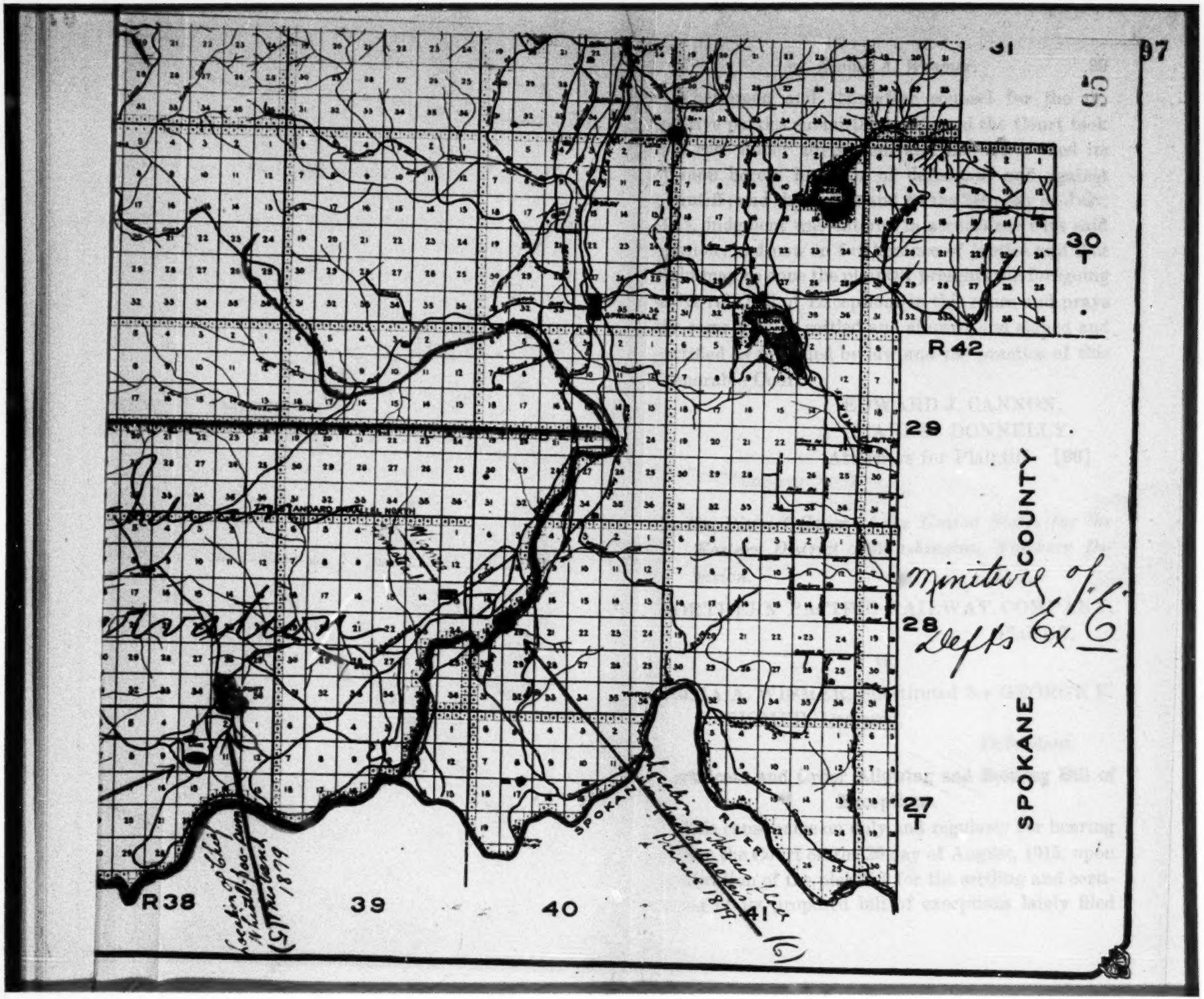
Number of horses.....936
Number of milch cows.....189
Number of oxen..... 45

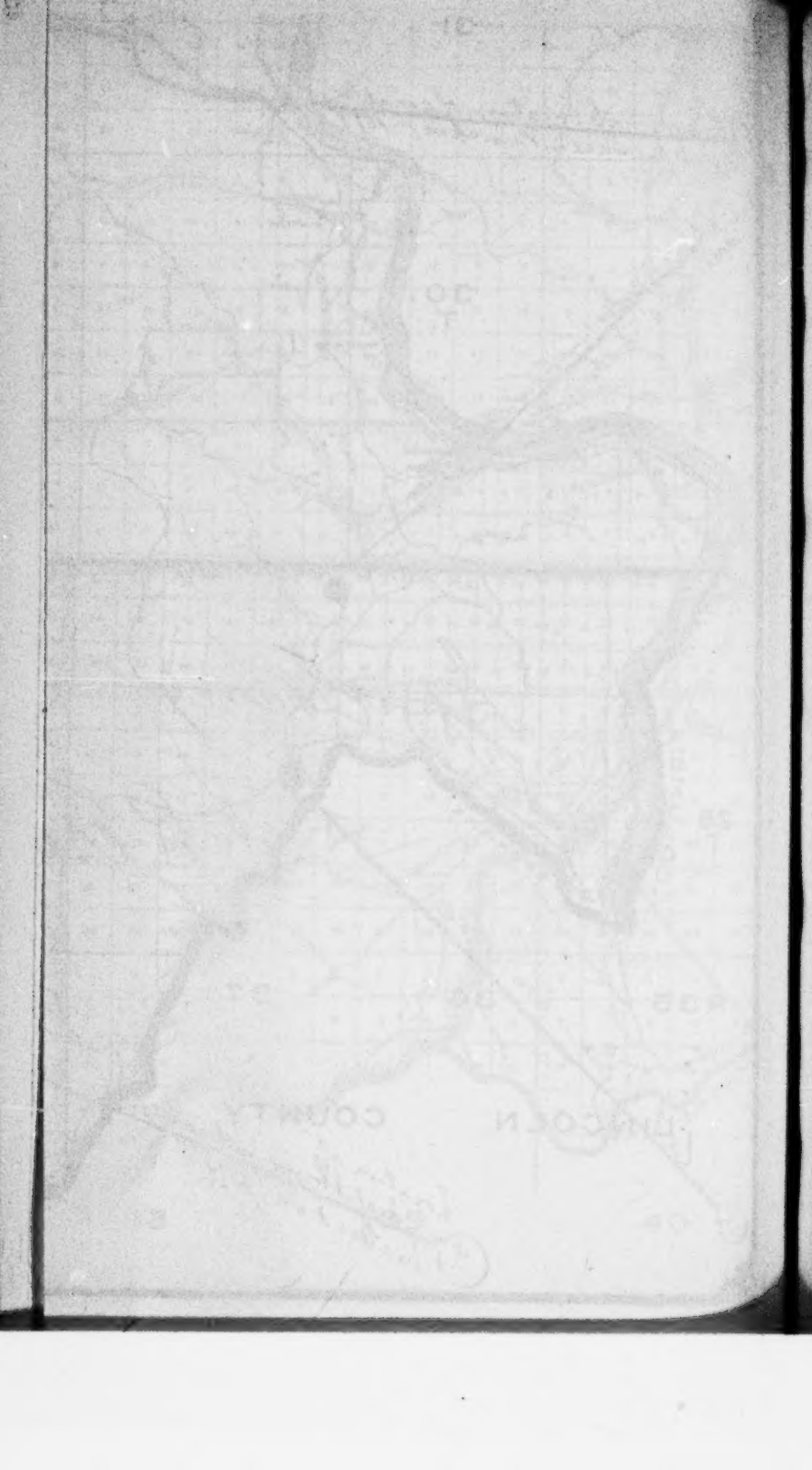
Number of other cattle.....130
Number of swine.....—
Number of fowls.....257
Number of tons of wild hay.....296

It is stipulated and agreed by and between counsel for the respective parties hereto that the plaintiff's railroad was completed opposite the lands in question subsequent to the 1st day of June, 1881.

Which was all the evidence offered or received on the hearing of said cause. [94]


31
1) Approximate location of small creek known as Tamahan in 1877
2) Place occupied by Chief Q and his band in 1879
30 T
HUNTERS
COLUMBIA RIVER
SPOKANE RIVER
28 T
R35
36
37
3) Claimed 600 or 640 acres
LINCOLN COUNTY
4) Location of Chief Sh-ma-mi-mi-mi


R42
30 T
29
28
27 T
SPOKAN
SPOKANE COUNTY
R38
39
40
SPOKANE RIVER
STANDARD PARALLEL NORTH
SPRINGDALE
miniature of E
Depts Ex



Whereupon and thereafter counsel for the respective parties submitted briefs and the Court took said case under advisement and thereafter filed its opinion herein in favor of defendant and against plaintiff; and thereafter and on the 24th day of July, 1915, judgment was entered in accordance with said opinion; and now in furtherance of justice and that right may be done the plaintiff presents the foregoing as its full Bill of Exceptions in this cause and prays the same may be settled and allowed and signed and certified as provided by law and the practice of this Honorable Court.

EDWARD J. CANNON,
CHARLES DONNELLY,
Attorneys for Plaintiff. [96]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

vs.

EMMA A. WISMER, Substituted for GEORGE F. WISMER, Deceased,
Defendant.

Certificate and Order Allowing and Settling Bill of Exceptions.

This cause came on duly and regularly for hearing before the Court on the 20 day of August, 1915, upon application of the plaintiff for the settling and certifying of its proposed bill of exceptions lately filed

herein, and the said proposed bill of exceptions having been presented, served and filed within the time allowed by law, and the defendant having proposed no amendments to said bill of exceptions, and the time for serving or filing any proposed amendments to said bill of exceptions having expired,—

Now, Therefore, on motion of attorneys for plaintiff, it is ORDERED, that said proposed bill of exceptions heretofore filed by the plaintiff in this cause, is hereby approved, allowed and settled as the true, full and correct bill of exceptions in said cause, containing in full all the evidence and proceedings taken and had upon the trial of said cause, and that the same as so settled and allowed be now and here certified accordingly by the undersigned Judge of this court, who presided at the trial of said cause, and that the bill of exceptions when so certified be filed herein by the clerk.

The foregoing bill of exceptions is full, true and correct in all respects, and it is hereby approved, allowed and settled [97] and made a part of the record herein.

Done in open court this 20 day of August, 1915.

FRANK H. RUDKIN,
Judge.

[Endorsements]: Bill of Exceptions. Filed in the U. S. District Court for the Eastern District of Washington. August 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [98]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

vs.

EMMA A. WISMER, Substituted for GEORGE F. WISMER, Deceased,
Defendant.

Assignments of Error.

Comes now the above-named plaintiff, Northern Pacific Railway Company, and makes and files the following Assignments of Error in said cause, which said plaintiff will rely upon in the United States Circuit Court of Appeals for the Ninth Judicial Circuit for relief from, and reversal of the judgment entered in said casue in the court below, to wit:

I.

The Court erred in making the following finding of fact:

> "That the plaintiff has not any interest in or title to any of the lands and premises described in the complaint and is not the owner or entitled to the possession thereof."

To which finding plaintiff excepted and exception was allowed.

II.

The Court erred in making the following conclusion of law:

"That plaintiff's action should be dismissed and defendant recover his costs."

To which conclusion plaintiff excepted and exception was allowed. [99]

III.

The Court erred in refusing to make the following findings of fact requested by plaintiff:

"That the plaintiff is the owner and entitled to the possession of the lands and premises described in the complaint and that the defendant has no interest therein and no right to the possession thereof."

To which refusal plaintiff excepted and exception was allowed.

IV.

The Court erred in refusing to make the following conclusion of law requested by plaintiff:

"That said plaintiff is the owner in fee simple and entitled to the exclusive possession of the property described in the complaint, and that said plaintiff recover of defendant its costs."

To which refusal plaintiff excepted and exception was allowed.

V.

The Court erred in entering judgment in favor of defendant, to which entry of judgment plaintiff excepted and exception was allowed.

VI.

The Court erred in refusing to enter judgment in favor of plaintiff, to which ruling plaintiff excepted and exception was allowed.

VII.

The Court erred in holding that the plaintiff is not the owner or entitled to the possession of the premises described in the complaint.

VIII.

The Court erred in holding that plaintiff has no title to the land involved in this suit. [100]

IX.

The Court erred in holding that the Spokane tribe of Indians had a special claim to the lands embraced in the reservation at the time of the definite location of the railroad such as would except said lands from the operation of the grant to the company.

X.

The Court erred in holding that the lands in question had been set apart for the use of the Indians by both the civil and military authorities of the Government.

XI.

The Court erred in holding that it was not necessary to show that the officers who attempted to establish a reservation had authority to do so.

XII.

The Court erred in holding that the special claim of the Indians was not advanced or relied upon in the case of Northern Pacific Railway Company vs. Mitchell, 208 Fed. 469.

The plaintiff duly excepted to the rulings of the Court in the matter of each of the above errors assigned and hereby and now assigns each and every

one of said rulings as error.

(Signed.) EDWARD J. CANNON,
CHARLES DONNELLY,
Attorneys for Plaintiff.

[Endorsements]: Assignments of Error. Filed August 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy.

Due service of within Assignments by receipt of a true copy thereof admitted this 20th day of August, 1915.

FRANCIS A. GARRECHT,
Attorney for Defendant. [101]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

vs.

EMMA A. WISMER, Substituted for GEORGE F. WISMER, Deceased,
Defendant.

Petition for Writ of Error.

To the Honorable Judges of the United States Circuit Court of Appeals, Ninth Judicial Circuit:

Comes now the above-named plaintiff, Northern Pacific Railway Company, a corporation, by its attorneys, and complains that in the records and proceedings had in said cause, and also in the rendition of the judgment in the above-entitled cause in said

United States District Court for the Eastern District of Washington, Northern Division, at the April term thereof, 1915, manifest error hath happened to the great damage of this plaintiff.

Your petitioner further respectfully shows that it has this day filed herewith its Assignments of Error committed by the court below in said cause and intended to be urged by your petitioner and plaintiff in error in the prosecution of this, its suit in error.

WHEREFORE, the plaintiff prays for the allowance of a Writ of Error to the said Circuit Court and for an order fixing the amount of bond for a supersedeas in said cause; and for such other orders and process as may cause the same to be corrected by the said United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated this 20th day of August, 1915.

EDWARD J. CANNON,
CHARLES DONNELLY,
Attorneys for Plaintiff. [102]

[Endorsements]: Petition for Writ of Error. Filed August 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy.

Due service of within Petition by receipt of a true copy thereof admitted this 20th day of August, 1915.

FRANCIS A. GARRECHT,
Attorney for Defendant. [103]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

vs.

EMMA A. WISMER, Substituted for GEORGE F. WISMER, Deceased,
Defendant.

Order Allowing Writ of Error and Fixing Amount of Bond.

The plaintiff, Northern Pacific Railway Company, a corporation, having this day filed its petition for a Writ of Error from the decision and judgment made and rendered herein, to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, together with an Assignment of Errors within due time, and also praying that an order be made fixing the amount of security which the plaintiff shall give and furnish upon said Writ of Error, and that upon the giving of said security all further proceedings of said court be suspended and stayed until the determination of said Writ or Error by said United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, and said petition having been this day duly allowed:

Now, therefore, it is ORDERED that upon the said plaintiff, Northern Pacific Railway Company, filing with the clerk of this Court a good and sufficient bond in the sum of One Thousand ($1,000)

Dollars, payable to EMMA A. WISMER, the defendant in the above-entitled cause, to the effect that if said plaintiff, Northern Pacific Railway Company, and plaintiff in error, shall prosecute the said Writ of Error to effect, and answer all damages and costs, if it fails to make its plea good, then the said obligation to be void, otherwise to remain in full force and effect, the said bond to be approved by the Court; that all further proceedings in this **[104]** suit be, and they are hereby suupended and stayed until the determination of said Writ of Error by the said United States Circuit Court of Appeals.

Dated this 20th day of August, 1915.

(Signed.) FRANK H. RUDKIN,
Judge.

[Endorsements]: Order Allowing Writ of Error and fixing amount of Bond. Filed August 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy.

Due service of the within order by receipt of a true copy thereof admitted this 20th day of August, 1915.

FRANCIS A. GARRECHT,
Attorney for Defendant. **[105]**

In the District Court of the United States for the Eastern District of Washington, Northern Division.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

vs.

EMMA A. WISMER, Substituted for GEORGE F. WISMER, Deceased,
Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, Northern Pacific Railway Compnay, a corporation, as principal, and the National Surety Company, a corporation organized and existing under and by virtue of the laws of the State of New York and authorized to do business as a surety company in the State of Washington, as surety, are held and firmly bound unto EMMA A. WISMER in the full and just sum of One Thousand ($1000) Dollars, to be paid to the said EMMA A. WISMER, to which payment well and truly to be made we bind ourselves and each of our successors or assigns, heirs, administrators, executors and legal representatives jointly and severally firmly by these presents.

Sealed with our seals and dated this 20 day of August, 1915.

WHEREAS, lately, in the District Court of the United States for the Eastern District of Washington, Northern Division, in an action pending in said court between the Northern Pacific Railway Com-

pany, as plaintiff and the said George F. Wismer, as defendant, a judgment was rendered in favor of said defendant and against said plaintiff, and Emma A. Wismer having been substituted as defendant for Geroge F. Wismer, deceased, and the said Northern Pacific Railway Company has obtained from said court a Writ of Error to reverse said judgment in the aforesaid action and a Citation directed to the said above-named defendant, Emma A. Wismer, **[106]** citing and admonishing her to appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

NOW, THEREFORE, the condition of the obligation is such that if the said Northern Pacific Railway Company, plaintiff in error, shall prosecute its said Writ of Error to effect, and answer all damages and costs, if it fails to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

NORTHERN PACIFIC RAILWAY COMPANY,

By EDWARD J. CANNON,
Its Attorney.

NATIONAL SURETY COMPANY,

[Corporate Seal] By OSCAR CAIN,
Resident Vice-president.

Attest: By S. A. MITCHELL,
Resident Assistant Secretary.

The above and foregoing bond approved this 20th day of August, 1915.

(Signed.) FRANK H. RUDKIN,
United States District Judge.

[Endorsements]: Bond on Writ of Error. Filed August 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy.

Due service of within bond by receipt of a true copy thereof admitted this 20th day of August, 1915.

FRANCIS A. GARRECHT,
Attorney for Defendant. **[107]**

In the District Court of the United States for the Eastern District of Washington, Northern Division.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

vs.

EMMA A. WISMER, Substituted for GEORGE F. WISMER, Deceased,
Defendant.

Citation on Writ of Error [Copy].

United States of America,—ss.

The President of the United States to Emma A. Wismer, and to Francis A. Garrecht, Your Attorney, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be held in San Francisco, in the State of California, within thirty (30) days from the date of this writ, pursuant to a Writ of Error

filed in the Clerk's office of the District Court of the United States for the Eastern District of Washington, Northern Division, wherein the Northern Pacific Railway Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment in said Writ of Error mentioned should not be corrected and speedy justice should not be done to the party in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of United States this 20th day of August, One Thousand Nine Hundred Fifteen, and of the Independence of the United States the one hundred and fortieth.

[Seal] (Signed.) FRANK H. RUDKIN,
United States District Judge. **[108]**

[Endorsements]: Citation on Writ of Error. Filed August 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy.

Due service of within Citation by receipt of a true copy thereof admitted this 20th day of August, 1915.

FRANCIS A. GARRECHT,
Attorney for Defendant. **[109]**

In the District Court of the United States for the Eastern District of Washington, Northern Division.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

vs.

EMMA A. WISMER, Substituted for GEORGE F. WISMER, Deceased,
Defendant.

Writ of Error [Copy].

The President of the United States, to the Honorable Judges of the District Court of the United States, for the Western District of Washington, Northern Division, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between the Northern Pacific Railway Company, a corporation, plaintiff in error, and Emma A. Wismer, defendant in error, a manifest error hath happened to the great damage of the said Northern Pacific Railway Company, plaintiff in error, as by its complaint appears:

We being willing that error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you may have the same at the City of San Francisco, in the State of California, on the 19th day of September next, in the said Circuit Court of Appeals to be then and there held; that the record and proceeding aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done therein to correct [110] that error what of right and according to the laws and customs of the

United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, the 20th day of August, in the year of our Lord One Thousand Nine Hundred and Fifteen.

[Seal] (Signed.) W. H. HARE,
Clerk of the United States District Court for the Eastern District of Washington, Northern Division.

[Endorsements]: Writ of Error. Filed August 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy.

Due service of within Writ by receipt of a true copy thereof admitted this 20th day of August, 1915.

FRANCIS A. GARRECHT,
Attorney for Defendant. [111]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

vs.

EMMA A. WISMER, Substituted for GEORGE F. WISMER, Deceased,
Defendant.

Praecipe for Transcript.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the complete record in the above-entitled case to be filed in the office

of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the writ of error to be perfected to said Court, and include in said transcript the following proceedings, pleadings, papers, records and files, to wit:

1. Transcript on removal from the Superior Court of Stevens County, Washington, consisting of complaint, petition for removal, stipulation, order of removal and certificates of clerk to transcript on removal.
2. Answer.
3. Reply.
4. Stipulation Waiving Jury Trial.
5. Opinion.
6. Findings of Fact and Conclusions of Law.
7. Judgment.
8. Plaintiff's Proposed Findings of Fact and Conclusion of Law.
9. Plaintiff's Proposed Judgment.
10. Petition of Emma A. Wismer for Substitution.
11. Order Substituting Emma A. Wismer as Defendant. [112]
12. Notice of Filing Bill of Exceptions.
13. Bill of Exceptions and Certificate.
14. Assignments of Error.
15. Petition for Writ of Error.
16. Order Allowing Writ of Error and Fixing Bond.
17. Bond.
18. Citation.

19. Writ of Error.

20. Praecipe for Transcript of Record.

And any and all records, entries, pleadings, proceedings, papers, filings necessary or proper to make a complete record upon said writ of error in said cause. Said transcript to be prepared as required by law and the rules of this Court, and the rules of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

(Signed) EDWARD J. CANNON,
CHARLES DONNELLY,
Attorney for Defendant.

[Endorsements]: Praecipe for Transcript. Filed August 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy.

Due service of within Praecipe by receipt of a true copy thereof admitted this 20th day of August, 1915.

FRANCIS A. GARRECHT,
Attorney for Defendant. [113]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2195.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff,

vs.

EMMA A. WISMER, Substituted for GEORGE F. WISMER, Deceased,

Defendant.

United States of America,
Eastern District of Washington,—ss.

I, W. H. Hare, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages are a full, true, correct and complete copy of so much of the record, pleadings, testimony and other proceedings had in the foregoing entitled cause as called for by the plaintiff and the plaintiff in error in its praecipe for a transcript of the record herein, as the same remains on file and of record in the office of the Clerk of said District Court, and that the same constitute the record on Writ of Error from the Judgment of the District Court of the United States for the Eastern District of Washington to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California, which Writ of Error was

lodged and filed in my office August 20, 1915.

I further certify that I hereto attach and herewith transmit the original Writ of Error and the original Citation issued in this cause.

I further certify that the fees of the Clerk of this Court for preparing and certifying to the foregoing record amounts to the sum of $27.15, and that the same has been paid in full by Edward J. Cannon, attorney for plaintiff and plaintiff in error. [114]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at Spokane, in said district, this 23d day of August, A. D. 1915.

[Seal] W. H. HARE,
Clerk. [115]

[Endorsed]: No. 2642. United States Circuit Court of Appeals for the Ninth Circuit. Northern Pacific Railway Company, a Corporation, Plaintiff in Error, vs. Emma A. Wismer, Substituted for George F. Wismer, Deceased, Defendant in Error. Transcript of Record Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Filed August 26, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

vs.

EMMA A. WISMER, Substituted for GEORGE F. WISMER, Deceased,
Defendant.

Writ of Error [Original].

The President of the United States, to the Honorable Judges of the District Court of the United States, for the Eastern District of Washington, Northern Division, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between the Northern Pacific Railway Company, a corporation, plaintiff in error, and Emma A. Wismer, defendant in error, a manifest error hath happened to the great damage of the said Northern Pacific Railway Company, plaintiff in error, as by its complaint appears:

We being willing that error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things

concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you may have the same at the City of San Francisco, in the State of California, on the 19th day of September next, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, the 20th day of August, in the year of our Lord One Thousand Nine Hundred and Fifteen.

[Seal] W. H. HARE,

Clerk of the United States District Court for the Eastern District of Washington, Northern Division.

[Endorsed]: No. 2195. In the U. S. District Court, Eastern District of Washington, Northern Division. Northern Pacific Railway Company, Plaintiff, vs. Emma A. Wismer, Substituted for George F. Wismer, Deceased, Defendant. Writ of Error. Due service of within Writ by receipt of a true copy thereof admitted this 20th day of August, 1915. Francis A. Garrecht, Attorney for Deft. Filed August 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy.

No. 2642. United States Circuit Court of Appeals for the Ninth Circuit. Original Writ of Error.

Filed Aug. 26, 1915. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By Meredith Sawyer, Deputy Clerk.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

vs.

EMMA A. WISMER, Substituted for GEORGE F. WISMER, Deceased,
Defendant.

Citation on Writ of Error [Original].

United States of America,—ss.

The President of the United States to Emma A. Wismer, and to Francis A. Garrecht, Your Attorney, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be held at San Francisco, in the State of California, within thirty (30) days from the date of this writ, pursuant to a Writ of Error filed in the clerk's office of the District Court of the United States for the Eastern District of Washington, Northern Division, wherein the Northern Pacific Railway Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment in said Writ of Error mentioned should not be corrected and speedy justice

should not be done to the party in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of United States, this 20th day of August, One Thousand Nine Hundred Fifteen, and of the Independence of the United States the one hundred and fortieth.

[Seal] FRANK H. RUDKIN,
United States District Judge.

[Endorsed]: No. 2195. In the U. S. District Court, Eastern District of Washington, Northern Division. Northern Pacific Railway Company, Plaintiff, vs. Emma A. Wismer, Substituted for George F. Wismer, Deceased, Defendant. Citation on Writ of Error. Due service of within Citation by receipt of a true copy thereof admitted this 20th day of August, 1915. Francis A. Garrecht, Attorney for Deft. Filed August 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy.

No. 2642. United States Circuit Court of Appeals for the Ninth Circuit. Original Citation on Writ of Error. Filed Aug. 26, 1915. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals, for the Ninth Circuit. By Meredith Sawyer, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2642.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff in Error,

vs.

EMMA A. WISMER, Substituted for George F. Wismer, Deceased, Defendant in Error.

Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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At a Stated Term, To Wit: the October Term, A. D. 1915, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court Room Thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the 19th Day of October, in the Year of Our Lord One Thousand Nine Hundred and Fifteen.

Present:

Honorable William B. Gilbert, Senior Circuit Judge, Presiding.
Honorable William W. Morrow, Circuit Judge.

No. 2642.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff in Error,
vs.
EMMA A. WISMER, Substituted for George F. Wismer, Deceased, Defendant in Error.

Order of Submission.

Ordered, above-entitled cause argued by Mr. Charles Donnelly, counsel for the plaintiff in error, and by Mr. United States Attorney Francis A. Garrecht, counsel for the defendant in error, and submitted to the Honorable William B. Gilbert, Erskine M. Ross and William W. Morrow, Circuit Judges, for consideration and decision.

At a Stated Term, To Wit: the October Term, A. D. 1915, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court Room Thereof, in the City and County of San Francisco, in the State of California, on Monday, the 7th Day of February, in the Year of Our Lord One Thousand Nine Hundred and Sixteen.

Present:

Honorable William B. Gilbert, Senior Circuit Judge, Presiding.
Honorable Erskine M. Ross, Circuit Judge.
Honorable William W. Morrow, Circuit Judge.

In the Matter of the Filing of Certain Opinions and of the Filing and Recording of Certain Decrees and Judgments.

By direction of the Honorable William B. Gilbert, Erskine M. Ross, and William W. Morrow, Circuit Judges, before whom the cases were heard, ordered that the typewritten Opinion this day rendered by this Court in each of the following-entitled causes be forthwith filed by the clerk, and that a Judgment or Decree be filed, and recorded in the minutes of this Court, in each of the causes in accordance with the Opinion filed therein: * * * Northern Pacific Railway Company, a Corporation, Plaintiff in Error, vs. Emma A. Wismer, etc., Defendant in Error, No. 2642.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2642.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff in Error,

vs.

EMMA A. WISMER, Substituted for George F. Wismer, Deceased, Defendant in Error.

Opinion, U. S. Circuit Court of Appeals.

Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Before Gilbert, Ross, and Morrow, Circuit Judges.

Ross, *Circuit Judge:*

The sole question in this case is whether the tract of land in controversy, consisting of 80 acres, passed to the plaintiff in error under and by virtue of the Act of Congress of July 2, 1864 (13 St. Lg. p. 365).

It is in effect conceded that it did if, on the date the railway company definitely fixed the line of its railroad and filed a plat thereof in the office of the Commissioner of the General Land Office, to-wit, October 4, 1880, the United States had full title thereto and the same was not reserved, sold, granted, or otherwise appropriated, and was free from pre-emption or other claims or rights.

The case is ejectment, and was submitted in the court below upon an agreed statement of facts, from which statement we quote, as follows:

"Prior to August 16, 1877, bands of Indians roved about and upon said lands and used the said country for hunting and fishing and so occupied the same as they did a considerable scope of country including the unoccupied and unsurveyed territory now comprising Eastern Washington; that said Indians had not ceded any right or interest in and to any part thereof, if they had —, to the Government of the United States.

"That in June, 1877, certain Indian bands and tribes of the northwest country had commenced hostilities against, and were engaged in killing, wounding and outraging white settlers and destroying their property, and that during said time and for five or six years

thereafter, said Indians continued to menace the white population living in Eastern Washington, Oregon, and Northern Idaho, and the military forces of the United States Government and said hostile Indians were engaged in actual warfare.

"That the said Indians so engaged in war with the United States during said time sought to induce other Indians at peace with the Government to engage in hostilities with them.

"That among the peaceful Indians, which those at war were endeavoring to have join them, were many residing on the lands afterwards set aside as the Spokane Indian Reservation, which Reservation includes the lands in the complaint.

"That upon August 16th, 17th and 18th, 1877, a council was held at Spokane Falls, Washington, between the Spokane Tribe of Indians, Colonel E. C. Watkins, who was then and there an Indian Inspector representing the Department of the Interior, acting in his official capacity; General Frank Wheaton and Captain M. C. Wilkinson, of the United States Army, representing the War Department.

"That for the purpose of collecting the said Indians belonging to the said tribe on a reservation, there to engage in agricultural pursuits and establish permanent homes, and to extinguish the general Indian title of any of the said Indians to all other lands not within the said reservation, and as a means of influencing said Indians to continue in friendly relations with the whites, to remain at peace with the Government of the United States, and abide by all laws of the same, and obey the orders of the Indian Bureau and the officers acting thereunder, the agreement, as set forth in Exhibit 'A' attached to the defendant's answer, was made, which is as follows:

"In Council at Spokane Falls, W. T.,
"August 18th, 1877.

"We, the undersigned Chiefs and head men of the Spokane Tribe of Indians for ourselves and our people hereby agree to accept the following described land for our reservation: Beginning at the source of the Chimokan Creek in Washington Territory, thence down said creek to the Spokane River, thence down said River to the Columbia River, thence up the Columbia River to the mouth of Nimchin Creek, thence easterly to the place of beginning.

"And we do further agree to go upon the same by the first of November next with the view of establishing our permanent homes thereon and engaging in agricultural pursuits. We hereby renew our friendly relations with the whites and promise to remain at peace with the Government and abide by all laws of the same, and obey the orders of the Indian Bureau and the Officers acting thereunder.

Names of Witnesses:
E. C. WATKINS,
U. S. Indian Inspector.

Names.

WHISTLE-POO-SUM	his X mark. SPOKANE.
QUIS-E-ME-OW	his X mark. SPOKANE.
AH-MI-MELECHIN	his X mark. SPOKANE.

FRANK WHEATON,
Bt. Major Gen., U. S. Army, Col. 2nd Infantry.

COS-TO-AKAN	his X mark. SPOKANE.
ORA-PA-HAN	his X mark. SPOKANE.
PAUL	his X mark. ORA-PA-HAM.

M. C. WILKINSON,
Bvt. Capt., U. S. Army, Aide de Camp.

"That thereafter, and prior to November 14, 1877, and pursuant to the agreement aforesaid, the said E. C. Watkins, Indian Inspector, as aforesaid, acting in his official capacity, located such of the said Spokane Indians as were not already resident thereon upon said Reservation above described, and said Spokane Indians remained upon and continued in use, occupancy, possession and enjoyment of said tract described in said agreement and claimed the same as their reservation continuously thereafter until the year 1910.

"That the action of the said E. C. Watkins in locating said Indians upon said reservation was by him reported to the Commissioner of Indian Affairs on November 14, 1877, and said report was, on January 23d, 1878, in response to a resolution, communicated by the Secretary of the Interior to the United States Senate, and by the Senate referred to the Committee on Indian Affairs and ordered printed.

"That about August, 1880, said Indians were much disturbed by the attempts of squatters to locate on land within the limits of said territory so claimed by the said Indians as their reservation, and on the 3d day of September, 1880, for the purpose of carrying out the terms of the agreement entered into at said council, and preserving peace between the Indians and white settlers, Brigadier-General Howard, of the Department of the Columbia, made an order, which

is as set forth in Exhibit 'B' attached to defendant's answer, which reads as follows:

"Headquarters Department of the Columbia,
"In Field, Spokane Falls, W. T.,
"September 3, 1880.

"Special Field Orders.

"No. 8.

"Whereas, in consequence of a promise made in August, 1877, by E. C. Watkins, Inspector of the Indian Department, to set apart, or have set apart, for the use of the Spokane Indians, the following described territory, to wit: Commencing at the mouth of the Cham-a-kane Creek, thence north eight miles in direction of said creek; thence due west to the Columbia River; thence along the Columbia and Spokane Rivers to the point of beginning—the Indians are still expecting the Executive Order in their case, and are much disturbed by the attempts of squatters to locate land within said limits, it is hereby directed that the above described territory, being still unsurveyed, be protected against settlement by others than said Indians, until the survey shall be made, or until further instructions. This order is based upon plain necessity to preserve the peace until the pledge of the Government shall be fulfilled, or other arrangements accomplished.

"The commanding officers of Forts Cœur d'Alene and Colville and Camp Chelan, are charged with the proper execution of this order.

"By command of Brigadier-General Howard.

"H. H. PIERCE,
"*1st Lieutenant, 21st Infantry,*
"*Acting Aide-de-Camp.*

"Official:
"H. H. PIERCE,
"*Acting Aide-de-Camp.*"

The agreed statement of facts further shows that the President by executive order made January 18, 1881, set aside and reserved for the use and occupancy of the Spokane Indians the lands embraced in the foregoing agreement with them and in the order of Gen. Howard, which lands included the tract here in controversy.

As already said, the only question in the case is whether at the time the line of the Northern Pacific Railroad Company was definitely located and the map thereof filed in the office of the Commissioner of the General Land Office, to-wit, on October 4, 1880, there was such an existing claim on the part of others to the land in controversy as took it out of the category of public lands, to which alone the grant to the railroad company applied.

Speaking of that particular grant the Supreme Court said in the case of Northern Lumber Co. v. O'Brien, 204 U. S. 190, 196:

"No lands passed that were not, at the date of the grant, public

land; that is, lands 'open to sale or other disposition under general laws,' not lands 'to which any claims or rights of others have attached.'"

In the preceding case of No. Pac. Railroad v. Musser-Sauntry Co., 168 U. S. 604, 608, the same court, speaking of the same grant and of lands thereby claimed to have been granted to the railroad company, said:

"Can it be said that they were free from such right when the very purpose of the withdrawal was to make possible the exercise of the right? But the language is not simply 'free from rights,' but 'free from claims,' and surely the defendant railway company had an existing claim. No one can read this entire description without being impressed with the fact that Congress meant that only such lands should pass to the Northern Pacific as were public lands in the fullest sense of the term, and free from all reservations and appropriations and all rights or claims in behalf of any individual or corporation at the time of the definite location of its road. Northern Pacific Railroad v. Sanders, 166 U. S. 620. And such is the general rule in respect to railroad land grants."

It is useless to cite the numerous other decisions of the Supreme and other courts to the same effect. Nor is it at all material that the outstanding claim be valid; for the Supreme Court, as well as other courts, have frequently decided that it is not the validity of such claim but the fact that it existed at the time of the definite location of the railroad, that excluded the lands in controversy from the category of "public lands" to which alone the company's grant attached. Decisions to that effect are also very numerous. See, among them, Newhall v. Sanger, 92 U. S. 761, 765; United States v. So. Pac. R. R., 146 U. S. 570, 606; United States v. So. Pac. R. R. Co., 76 Fed. 134, and cases supra.

Now looking at the agreed statement of facts in the present case, it is seen that long prior to the grant to the Northern Pacific Railway Company, and as early as 1877, the tract of land in controversy here was included within lands claimed by the Spokane tribe of Indians, and that on August 16th, 17th, and 18th of the year last mentioned, a council was held at Spokane Falls, Washington, between that tribe of Indians and an Indian Inspector representing the Department of the Interior, and Gen. Wheaton and Capt. Wilkinson of the United States Army representing the War Department, with the view to establishing the Indians mentioned on a reservation, and to extinguish the general Indian title of any of the Indians of that tribe to any lands not within such reservation, and as a result of that council an agreement in writing was entered into on the 18th of August, 1877, between the chiefs and head-men of the Spokane tribe for themselves and their people, and the above mentioned representatives of the Interior and War Departments of the United States, by which a specifically described tract of land should be set aside as a reservation for the Indians referred to, and accepted by them in lieu of their claim to the larger tract referred to; and that thereafter, and prior to November 14th, 1877, and in pursuance of the aforesaid agreement, the Indian Inspector mentioned, acting in his

official capacity, located such of the said Spokane Indians as were not already thereon, upon the said specifically described tract, which Indians continued in the possession, use, and enjoyment thereof and claimed the same as their reservation continuously until the year 1910; that the said action of the said Inspector was reported to the Commissioner of Indian Affairs on November 14th, 1877, which report was on January 23rd, 1878, in response to a resolution, communicated by the Secretary of the Interior to the United States Senate, and by the Senate referred to the Committee on Indian Affairs and ordered printed; that about August, 1880, the said Indians being much disturbed by the attempts of squatters to locate on lands within the limits of the specifically described tract upon which they had been so located by the Interior Department, for the purpose of carrying out the terms of the agreement entered into by the government officials with the Indians, and preserving peace between them and white settlers, Gen. Howard issued the order of September 3rd, 1880, above set out. And on January 18th, 1881, the President, in further pursuance of the aforesaid agreement between the Indians and the government officials, by executive order set aside and reserved for the use and occupancy of the Spokane Indians the specific tract embraced in the agreement made between the government and the Indians, which specific tract included the piece of land here in controversy. And on March 29th, 1908, Congress consummated the aforesaid agreement with the Indians by passing an act authorizing and directing the Secretary of the Interior to cause allotments to be made under the provisions of the allotment laws of the United States to all persons having tribal rights or holding tribal relations and who may rightfully belong on the Spokane Indian Reservation and who had not theretofore received allotments, and making provision for the sale of the surplus lands, and various other provisions not important to be mentioned. (35 St. Lg. 456.)

So that we have here a case in which it is agreed that on October 4th, 1880, the piece of land in controversy, as a part of the tract specifically described as and for a reservation of the Spokane Indians, was in their actual use, occupancy, possession and enjoyment, and was claimed by them as their reservation, and had been so occupied and claimed continuously since as early as November 14th, 1877; which possession was established by the Secretary of the Interior through a subordinate officer, and which claim by the Indians was thereafter continuously recognized not only by the Interior Department, but subsequently ratified and confirmed by the action of the President as well as by that of Congress.

It thus clearly appears that at the time the line of the Northern Pacific Company was definitely located and the plat thereof filed in the office of the Commissioner of the General Land Office, the piece of land here in dispute was claimed not only by the Indians, but was claimed by the Secretary of the Interior for them and in their behalf.

The judgment is affirmed.

Endorsed: Opinion. Filed Feb. 7, 1916. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2642.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff in Error,

vs.

EMMA A. WISMER, Substituted for George F. Wismer, Deceased, Defendant in Error.

Judgment.

In Error to the District Court of the United States for the Eastern District of Washington, Northern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Eastern District of Washington, Northern Division and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the defendant in error and against the plaintiff in error.

It is further ordered and adjudged by this Court that the defendant in error recover against the plaintiff in error for her costs herein expended, and have execution therefor.

Endorsed: Judgment. Filed and Entered Feb. 7, 1916. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2642.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff in Error,

vs.

EMMA A. WISMER, Substituted for George F. Wismer, Deceased.

Petition for Writ of Error to the Supreme Court of the United States.

Now comes the above named Northern Pacific Railway Company and prays that a writ of error in the above entitled case may issue to said United States Circuit Court of Appeals for the Ninth Circuit to review a certain judgment entered in said court on the 7th day of February, 1916, in favor of the said Emma A. Wismer, substituted for George F. Wismer, deceased, and against the said Northern Pacific Railway Company, for the reason that manifest error hath intervened in the rendition of said judgment to the great damage

of the petitioner, all of which will more in detail appear in the assignment of errors which is filed with this petition.

(Signed) CHARLES W. BUNN AND
CHARLES DONNELLY,
Attorneys for Plaintiff in Error.

Upon filing the bond approved by me in the sum of one thousand dollars, let a writ of error issue as prayed for, and the clerk of this Court is hereby directed to sign, seal and issue said writ.

(Signed) WM. B. GILBERT,
Presiding Judge U. S. Circuit Court of Appeals for the Ninth Circuit.

Dated: February 28, 1916.

Endorsed: Petition for, and order allowing writ of error to Supreme Court of the United States. Filed Feb. 28, 1916. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit, by Meredith Sawyer, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2642.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff in Error,
vs.
EMMA A. WISMER, Substituted for George F. Wismer, Deceased.

Assignment of Errors.

Now comes the above named Northern Pacific Railway Company by Charles W. Bunn and Charles Donnelly, its attorneys, and assigns the following errors in the judgment of this court herein:

1. The court erred in holding that the land in question was excepted from the grant to the Northern Pacific Railroad Company because of a claim thereon.
2. The court erred in affirming the judgment of the United States District Court for the Eastern District of Washington, Northern Division.
3. The Court erred in entering judgment in favor of the defendant in error.

(Signed) CHARLES W. BUNN AND
CHARLES DONNELLY,
Attorneys for Plaintiff in Error.

Endorsed: Assignment of errors. Filed Feb. 28, 1916. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit, by Meredith Sawyer, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2642.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff in Error,
vs.
EMMA A. WISMER, Substituted for George F. Wismer, Deceased.

Bond on Writ of Error.

Know all men by these presents that we, Northern Pacific Railway Company, a corporation, as principal, and the National Surety Company, a corporation organized and existing under and by virtue of the laws of the State of New York and authorized to do business as a surety company in the State of Washington, as surety, are held and firmly bound unto Emma A. Wismer in the full and just sum of one thousand dollars ($1,000.00) to be paid to the said Emma A. Wismer, to which payment well and truly to be made we bind ourselves and each of our successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 23rd day of February, 1916.

Whereas lately in the United States Circuit Court of Appeals for the Ninth Circuit in an action pending in said court between the Northern Pacific Railway Company as plaintiff in error and the said Emma A. Wismer, substituted for George F. Wismer, deceased, a judgment was rendered in favor of said Emma A. Wismer and the said Northern Pacific Railway Company has obtained from said court a writ of error to reverse said judgment in the aforesaid action and a citation directed to the said above named Emma A. Wismer citing and admonishing her to appear in the Supreme Court of the United States at the City of Washington to answer said writ of error,

Now, the condition of the above obligation is such that if the said Northern Pacific Railway Company shall prosecute the said writ of error to effect and answer all damages and costs if it shall fail to make its plea good, this obligation to be void; otherwise to remain in full force and virtue.

NORTHERN PACIFIC RAILWAY COMPANY,
(Signed) By CHARLES DONNELLY,
Its Attorney.

[SEAL.] NATIONAL SURETY COMPANY,
(Signed) By C. M. BEND,
Its Attorney-in-Fact.

As to Surety.

(Signed) V. W. O'TOOLE.
G. W. CEDARLEAF.
L. A. GREEN.

STATE OF MINNESOTTA,
County of Ramsey, ss:

On this 23rd day of February, A. D. 1916, before me personally appeared C. M. Bend, attorney in fact of the National Surety Company, the above named corporation, with whom I am personally acquainted, who, being by me duly sworn, said that he is attorney in fact of said corporation, The National Surety Company; that he knows the corporate seal; that it was affixed by order of the board of directors of said corporation, and that he signed said instrument as attorney in fact of said corporation by like authority and the said C. M. Bend acknowledged said instrument to be the free act and deed of said corporation.

[SEAL.] (Signed) G. W. CEDARLEAF,
Notary Public, Ramsey County, Minnesota.

My commission expires June 2nd, 1920.

Approved:
(Signed) WM. B. GILBERT,
Presiding Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

Endorsed: Bond on writ of error, returnable in Supreme Court of the United States. Filed Feb. 28, 1916. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit, by Meredith Sawyer, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2642.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff in Error,
v.
EMMA A. WISMER, Substituted for George F. Wismer, Deceased, Defendant in Error.

Præcipe for Transcript.

To the Clerk of the said Court:

SIR: Please make and furnish me with a certified transcript of the record including the proceedings had in said Circuit Court of Appeals, the said transcript to consist of a copy of the following:

1. Printed transcript of record on which the cause was heard in said Circuit Court of Appeals, to which will be added a copy of the following entitled proceedings that were had and all of the papers that were filed in said Circuit Court of Appeals, namely:
2. Order of submission, entered October 19, 1915.
3. Order directing filing of opinion, etc., entered February 7, 1916.

4. Opinion, filed February 7, 1916.
5. Judgment, filed and entered February 7, 1916.
6. Petition for, Order allowing Writ of Error returnable in Supreme Court U. S. and fixing amount of bond on Writ of Error, filed February 28, 1916.
7. Assignment of Errors, filed February 28, 1916.
8. Bond on Writ of Error, filed February 28, 1916.
9. Præcipe for Certified Transcript of Record on return to Writ of Error, returnable in Supreme Court U. S., filed March 18, 1916.
10. Certificate of Clerk United States Circuit Court of Appeals to Transcript of Record.
11. Original Writ of Error, returnable in Supreme Court U. S., filed March 13, 1916.
12. Original Citation on Writ of Error, returnable in Supreme Court U. S., filed March 18, 1916.

(Signed) CHARLES W. BUNN AND
CHARLES DONNELLY,
Counsel for Plaintiff in Error.

Due service of the foregoing Præcipe and receipt of copy thereof acknowledged this — day of March, 1916.

____ ____,
Attorney for Defendant in Error.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2642.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff in Error,
v.
EMMA A. WISMER, Substituted for George F. Wismer, Deceased, Defendant in Error.

Affidavit of Service.

STATE OF WASHINGTON,
County of Spokane, ss:

G. M. Ferris, being first duly sworn on oath deposes and says: That he is and was at all times hereinafter mentioned, a citizen of the United States and of the State of Washington, over the age of 21 years, competent to be a witness in the above entitled action and not a party thereto or interested therein; that on the fifteenth day of March, 1916, he served a full, true and correct copy of the foregoing Præcipe for Transcript on Francis A. Garrecht the attorney for Defendant in Error, by delivering to and leaving with the said Francis A. Garrecht in the City of Spokane, State of Washington on said fifteenth day of March, 1916, a full, true and correct copy thereof.

(Signed) G. M. FERRIS.

Subscribed and sworn to before me this 15 day of March, 1916.
[SEAL.] (Signed) E. J. FERRIS,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

Endorsed: Præcipe for transcript on return to writ of error to Supreme Court of the United States. Filed Mar. 18, 1916. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2642.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff in Error,
vs.
EMMA A. WISMER, Substituted for George F. Wismer, Deceased, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record on Return to Writ of Error from Supreme Court U. S.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and forty-two (142) pages, numbered from and including 1 to and including 142, to be a full, true and correct copy of the complete record, made pursuant to the præcipe filed by counsel for the plaintiff in error on the 18th day of March, A. D. 1916, under Rule 8 of the Supreme Court of the United States, in the above-entitled case, including the Assignment of Errors filed on the writ of error from said Supreme Court, and of all proceedings had, and of all papers, including the opinion, filed in the said Circuit Court of Appeals in the above-entitled case, as the original papers and proceedings had remain on file and appear of record in my office, and that the same, together, constitute the Transcript of Record, on return to the annexed writ of error from the Supreme Court of the United States in the above-entitled cause, as made and certified pursuant to the said præcipe.

Attest my hand and the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this sixth day of April, A. D. 1916.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, canceled Apr. 5, 1916. F. D. M., Clerk.]

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, or some of you, between Northern Pacific Railway Company, a Corporation, Plaintiff in Error, and Emma A. Wismer, Substituted for George F. Wismer, Deceased, Defendant in Error, No. 2642, a manifest error hath happened, to the great damage of the said Northern Pacific Railway Company, a Corporation, Plaintiff in Error, as by its complaint appears;

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the City of Washington, in the District of Columbia, within sixty days from the date hereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, the twenty-eighth day of February, in the year of our Lord One Thousand, Nine Hundred and Sixteen.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Allowed by:
WM. B. GILBERT,
Senior United States Circuit Judge.

Return to Writ of Error.

The answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit to the within Writ of Error:

As within we are commanded, we certify under the Seal of our said Circuit Court of Appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

San Francisco, California, April 6, 1916.

By the Court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed:] No. 2642. United States Circuit Court of Appeals for the Ninth Circuit. Northern Pacific Railway Company, a Corporation, Plaintiff in Error, vs. Emma A. Wismer, Substituted for George F. Wismer, Deceased, Defendant in Error. Original. Writ of Error. Filed Mar. 13, 1916. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, *ss:*

To Emma A. Wismer, Substituted for George F. Wismer, Deceased:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at the City of Washington, D. C., within sixty days from the date hereof pursuant to a writ of error filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, wherein Northern Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ mentioned, should not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable William B. Gilbert, presiding judge of the United States Circuit Court of Appeals for the Ninth Circuit, this 28 day of February, in the year of our Lord one thousand nine hundred and sixteen.

WM. B. GILBERT,
Presiding Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

Due service of the within citation accepted this — day of ——, 1916.

——— ———,
Attorney for Emma A. Wismer.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2642.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff in Error,
v.
Emma A. Wismer, Substituted for George F. Wismer, Deceased, Defendant in Error.

Affidavit of Service.

STATE OF WASHINGTON,
County of Spokane, ss:

G. M. Ferris, being first duly sworn on oath deposes and says: That he is and was at all times hereinafter mentioned, a citizen of the United States and of the State of Washington, over the age of 21 years, competent to be a witness in the above entitled cause and

not a party thereto or interested therein; that on the fifteenth day of March, 1916, he served a full, true and correct copy of the foregoing Citation on Francis A. Garrecht, the attorney for Defendant in Error, by delivering to and leaving with the said Francis A. Gerrechet in the City of Spokane, State of Washington on said 15th day of March, 1916, a full, true and correct copy thereof.

G. M. FERRIS.

Subscribed and sworn to before me this 15 day of March, 1916.

[Seal E. J. Ferris, Notary Public, State of Washington. Commission expires Sep. 6, 1919.]

E. J. FERRIS,
Notary Public in and for the State of Washington, Residing at Spokane, Washington.

[Endorsed:] Docketed. No. 2642. U. S. Circuit Court of Appeals for the Ninth Circuit. Northern Pacific Railway Company, Pl'ff in Error, vs. Emma A. Wismer. Citation. C. W. Bunn and Charles Donnelly, Attorneys for Pl'ff in Error, St. Paul, Minnesota. Due service of this instrument and receipt of copy thereof admitted at —— this — day of ——, 191–. —— ——, Attorney for ——. Filed Mar. 18, 1916. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

Endorsed on cover: File No. 25,252. U. S. Circuit Court Appeals, 9th Circuit. Term No. 969. Northern Pacific Railway Company, plaintiff in error, vs. Emma A. Wismer, substituted for George F. Wismer, deceased. Filed April 20th, 1916. File No. 25,252.

6

Office Supreme Court, U. S.
FILED
DEC 8 1917
JAMES D. MAHER,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 152.

NORTHERN PACIFIC RAILWAY COMPANY a corporation,
Plaintiff in Error,

vs.

EMMA A. WISMER, substituted for GEORGE F. WISMER, Deceased,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

CHARLES W. BUNN,
CHARLES DONNELLY.

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SUPREME COURT OF THE UNITED STATES.

NORTHERN PACIFIC RAILWAY COMPANY a corporation,
Plaintiff in Error,

vs.

EMMA A. WISMER, substituted for GEORGE F. WISMER, Deceased,
Defendant in Error.

STATEMENT.

This case involves but a single question, namely, whether the lands sought to be recovered in it, and which lie within the place limits of the grant to the Northern Pacific Railroad Company, were excepted from that grant because reserved or claimed by the Indians at the date of the definite location of the Northern Pacific Railroad. The facts are as follows:

By Section 3 of an act approved July 2, 1864, (13 Stat. 365) Congress incorporated the Northern Pacific Railroad Company and made a grant of lands to it. This Court is familiar with the language of the grant, but we print it here so that it may be referred to conveniently.

"Sec. 3. *And be it further enacted,* That there be, and hereby is, granted to the 'Northern Pacific Rail-

road Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: *Provided,* That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided, further,* That the railroad company receiving the previous grant of land may assign their interest to said 'Northern Pacific Railroad Company,' or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: *Provided, further,* That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road, *and within fifty miles*

> *thereof,* [1] may be selected as above provided: *And provided, further,* That the word 'Mineral,' when it occurs in this act shall not be held to include iron or coal: *And provided, further,* That no money shall be drawn from the treasury of the United States to aid in the construction of the said 'Northern Pacific Railroad.' "

When the act was passed and for years thereafter bands of Indians roved about upon much of the territory through which the railroad is now built. In the summer of 1877, some of these had commenced hostilities against white settlers and sought to induce others, including those residing on the lands in controversy to join them. In August, 1877, a council was held at Spokane Falls, Washington, between the Spokane Tribe of Indians, Colonel E. C. Watkins, (who was an Indian inspector representing the Department of the Interior), General Frank Wheaton, and Captain M. C. Wilkinson of the United States Army. At this council the chiefs and head men of the Spokane Tribe of Indians agreed that they would accept for their reservation a certain tract of land, including the land in controversy, and that they would move upon it by the first of November with a view of establishing permanent homes. (Tr. 56.) This agreement was as follows:

> "We, the undersigned Chiefs and head men of the Spokane Tribe of Indians for ourselves and our people hereby agree to accept the following described land for our reservation: Beginning at the source of the Chimokan Creek in Washington Territory, thence down said creek to the Spokane River, thence down said River to the Columbia River, thence up the Columbia River to the mouth of Nimchin Creek, thence easterly to the place of beginning.

(1) The italicized words, "and within fifty miles thereof," do not appear in this section as it is printed in the Statutes at Large, but they are in the act as passed and approved, and as recorded in the State Department. 29 Op. A. G. 498, 41 L. D. 571. The question involved in this case, however, is in no way affected by them.

> And we do further agree to go upon the same by the first of November next with the view of establishing our permanent homes thereon and engaging in agricultural pursuits. We hereby renew our friendly relations with the whites and promise to remain at peace with the Government and abide by all laws of the same, and obey the orders of the Indian Bureau and the officers acting thereunder."

On August 18, 1877, the day when this agreement was taken from the Indians, Inspector Watkins wrote to Brigadier-General Howard of the Department of the Columbia, advising him that he had "decided to recommend" the reservation described in the agreement (Tr. 75), and on August 23, 1877, he reported to the Commissioner of Indian Affairs to the same effect, that he had "decided to recommend" that such a tract of land be set apart for them. (Tr. 73.) Thereafter, on November 14, 1877, he located the Spokane Indians on the tract described, and he reported his action to the Commissioner of Indian Affairs on the same day. (Tr. 57-58.) What appears to have been this same report, though bearing date November 26, 1877, (Tr. 78) was transmitted by the Commissioner of Indian Affairs to the Secretary of the Interior January 22, 1878, and by the Secretary of the Interior to the United States Senate January 23, 1878. (Tr. 58.) The two letters transmitting this report, though not copied in this record, appear on pages 472-473 of 208 Fed.

In August, 1880, the Indians were disturbed by attempts of squatters to locate on the lands set apart and September 3, 1880, Brigadier-General Howard made the following order:

"HEADQUARTERS DEPARTMENT OF THE COLUMBIA.
In Field, Spokane Falls, W. T.
September 3, 1880.

SPECIAL FIELD ORDERS.
No. 8.

Whereas, in consequence of a promise made in August, 1877, by E. C. Watkins, Inspector of the Interior Department, to set apart, or have set apart, for the use of the Spokane Indians, the following described territory, to-wit: Commencing at the mouth of the Cham-a-kane Creek, thence north eight miles in direction of said creek; thence due west to the Columbia river; thence along the Columbia and Spokane Rivers to the point of beginning—the Indians are still expecting the Executive Order in their case, and are much disturbed by the attempts of squatters to locate land within said limits, it is hereby directed that the above described territory, being still unsurveyed, be protected against settlement by others than said Indians, until the survey shall be made, or until further instructions. This order is based upon plain necessity to preserve the peace until the pledge of the Government shall be fulfilled, or other arrangements accomplished.

The commanding officers of Forts Coeur d'Alene and Colville and Camp Chelan are charged with the proper execution of this order.

By command of Brigadier-General Howard."

Thirty-one days thereafter, October 4, 1880, the Northern Pacific Railroad Company filed its map of definite location opposite the lands in question (Tr. 51) which lie within the place limit of the grant as shown by that map. (Tr. 52.) About three and a half months after definite location, President Hayes made the following order (Tr. 60):

"Executive Mansion, January 18, 1881.

"It is hereby ordered that the following tract of land situated in Washington Territory be, and the same is hereby, set aside and reserved for the use and occupancy of the Spokane Indians, namely:

> Commencing at a point where the Chemakane Creek crosses the forty-eighth parallel of latitude; thence down the east bank of said creek to where it enters the Spokane River; thence across said Spokane river westwardly along the southern bank thereof to a point where it enters the Columbia River; thence across the Columbia River northwardly along its western bank to a point where said river crosses the said forty-eighth parallel of latitude, thence east along said parallel to the place of beginning.
>
> R. B. HAYES."

Neither the description in General Howard's order nor the description in the order of President Hayes is identical with the description contained in Colonel Watkins' agreement with the Indians; but all agree that the lands in controversy are embraced within each of the three descriptions.

The lands along the railroad, with the exception of the lands thus set apart, were surveyed in 1887. (Tr. 52.) The reservation itself was surveyed in 1906.

By Act of Congress of May 29, 1908 (35 Stat. 458) the Secretary of the Interior was authorized and directed to cause allotments of the lands thus set apart to be made under the provisions of the allotment laws of the United States to all persons having tribal rights or holding tribal relations with the Spokane Indians, or who might rightfully belong on the Spokane Indian Reservation, and who had not theretofore received allotments. The Act provided further that upon the completion of the allotments the Secretary of the Interior should classify the surplus lands as agricultural and timber lands, and that the lands classified as agricultural lands should be open to settlement and entry under the homestead laws of the United States by a proclamation

of the President which would prescribe the time and the manner in which the land might be settled upon, occupied and entered by persons entitled to make entry, and that no person should be permitted to settle upon, occupy or enter any of such lands except as prescribed in the proclamation. Under other provisions of the act the United States acted as trustee for the Indians in disposing of the surplus lands and the purchase price of $5.00 per acre was to be credited to the Spokane Tribe.

The Northern Pacific Railway Company, plaintiff in error, (which had in the meantime succeeded to the rights of the Northern Pacific Railroad Company) thereupon asserted its right to the odd-numbered sections of the so-called reservation lying within the place limits of the grant. Its claim was rejected by the Secretary of the Interior (Tr. 61-64) and this decision was affirmed on review. (38 L. D. 496.) It notified all entrymen of its claim to the odd-numbered sections (Tr. 52-54) and upon patents being issued to the entrymen it began actions of ejectment against them, the present action being one of them. The first of these actions to be tried was that of Northern Pacific Railway Company v. Mitchell. As in the present case, the United States Attorney at Spokane appeared for the defendant. It was contended on behalf of defendant in that action that the land in question was *reserved* before map of definite location was filed. This contention was rejected by the trial court, and judgment was entered in favor of the railway company. The court's opinion appears in 208 Fed., beginning at p. 470. A writ of error to the Circuit Court of Appeals for the Ninth Circuit was sued out by the United States Attorney to review the decision; but as more than six

months had elapsed that court was without jurisdiction and the writ was dismissed May 11, 1914. In order to get a definite judgment upon which the Department of the Interior might act, it became necessary to press to a decision another one of the ejectment cases and accordingly the present case was brought on for hearing. In the present case Judge Rudkin, in the trial court, while adhering to his original decision that the lands were not reserved (Tr. 33), decided that at the time of definite location the Indians had *a special claim* to them and directed judgment to be entered against the railway company. (Tr. 29-39.) The Circuit Court of Appeals affirmed his decision; (Tr. 124) and to review its decision the present writ has been sued out.

ASSIGNMENT OF ERROR.

The Court erred in holding that the Indians had a special claim to the lands in question at the time of definite location of the railroad.

ARGUMENT.

That the lands in question were public lands on July 2, 1864, stands admitted; and, as they lie within the place limits of the grant, title to them vested in the railroad company October 4, 1880, when map of definite location was filed, unless between those two dates something was done which operated to throw them into one or the other of the excepted classes. The only things suggested as having that effect are the acts of Watkins in 1877 and the order of General Howard on September 3, 1880. The trial court held in *Northern Pacific Railway Co. v. Mitchell,* 208 Fed. 470, that these acts did not operate to *reserve* the lands; and it remains of that opinion. (Tr. 38.) It considers, however, that they did operate to give to the Indians a special claim upon them, and therefore it is now of the opinion that they were within one of the excepted classes when map of definite location was filed, and that the railroad took no title to them. The court below also takes this view. (Tr. 124-129.)

It is, of course, a matter of indifference, as regards the ultimate disposition to be made of this case, into which one of the excepted classes the lands are said to fall. Whether excepted because reserved or because a claim

had attached to them, it is the acts of Watkins and Howard that are relied upon as creating the exception. It is not contended, and cannot be contended, that because they were a part of the Indian country at the date of the grant a claim existed which operated to except them. Against such a contention *Buttz v. Northern Pacific Railroad Co.*, 119 U. S. 55, is conclusive. From whatever angle the case is approached, therefore, the decision is that lands which otherwise would have passed to the Railroad Company were lost to that company because of what was done by Watkins and Howard previous to the date of definite location. The single question, then, is, did either Watkins or Howard have the power or the authority to create or initiate rights in the public lands? If they did the case has been rightly decided; but it is as accurate to say that they created a reservation as to say that they created a claim, for they had as much authority to create the one as the other. If they did not have such authority we are entitled to a reversal.

By Article IV, Section 3 of the Constitution of the United States, the power to dispose of public lands is broadly conferred upon Congress. For many years, however, the practice of withdrawing lands from the operation of general laws and creating reservations has been followed by the Executive; and in the recent case of *United States v. Midwest Oil Co.*, 234 U. S. 459, the court discusses the question of the right of the Executive to pursue this practice. The right was sustained by a divided court, and it seems clear from the opinion that, following the doctrine of *Wilcox v. Jackson*, 13 Pet. 513, the act of the Secretary of the Interior would be treated as the act of the Executive. Beyond this, however, the decision does not go. It has

never been suggested that such right or authority reposed in the subordinates of any department. As said by the trial court in *Northern Pacific Railway Company v. Mitchell, supra,* at page 472:

> "So far as I am advised, no such power has been delegated to other subordinate officers of the government, whether civil or military, and the acts of such officers, without authorization from the President or from Congress, *are ineffectual for any purpose.*"

In *United States v. Tichenor,* 12 Fed. 415, the effect of a similar order made by a subordinate officer of the War Department was considered by Judges Sawyer and Deady. The court said:

> "It may be admitted, as suggested in *Wilcox v. Jackson,* 13 Pet. 513 (10 L. Ed. 264), that if the order directing the reservation to be made had been issued by the Secretary of War, the head of the department through whom the president would speak and act upon the subject, in the absence of evidence to the contrary, it would be presumed that he acted by the direction of the President. But neither Gen. Hitchcock nor Lieut. Wyman had any authority to designate or establish a reservation at Port Orford for any purpose. It is not alleged that they were acting in the premises under the authority of the President, and there is no presumption of law that they were. It may also be admitted that Gen. Hitchcock could direct his subaltern, engaged in military operations in Oregon, to establish and occupy a camp or fort on the public lands therein, or that the latter might do so under the circumstances without any direction from the former. But such use or occupation would not have the effect to impart any special character to the land, or constitute it a reservation for any purpose, within the purview of the donation act. It would still remain open to the claim of any qualified settler under the act, and as soon, at least, as the camp or post was removed or abandoned by the military force, might be actually occupied by any such settler."

This language was quoted with approval by this court in *Scott v. Carew*, 196 U. S. 100; and it is this principle that we invoke here. The general right of the Indians to occupy lands to which their title had not been extinguished is of course indisputable; and because it was indisputable provision was made by the second section of the Northern Pacific grant (13 Stat. 365, 367) for the extinguishment of that title. Possessing this right they were as free *to occupy* one tract within the Indian country as to occupy another, and of course were within their rights *in occupying* the tract which Watkins undertook to have set apart for them. But the grant to the Northern Pacific Company conveyed the fee subject to the Indians' right of occupancy; and upon the termination of that right the grant became absolute. Nothing can be taken as settled in the law if *Buttz v. Northern Pacific Company, supra,* does not settle this. The Indians, then, had the right *to occupy* the lands in question not only after the grant of 1864, but as well after the definite location of the railroad on October 4, 1880; but it was a mere right of occupancy; and as the only attempt to make it anything more, on the part of any one having authority to make it anything more, was after definite location, it never became anything more, and upon its termination the Railway Company had a right to possession.

Moreover, apart from any question of power or authority there is the question whether either Watkins or Howard *professed* to be initiating rights in these lands. We think it apparent from the slightest inspection of the communications of Inspector Watkins that he does not arrogate to himself the authority necessary to set these lands apart or to create a claim upon them. His account of

the council, as contained both in his letter to General Howard of August 18, 1877 (Tr. 75), and his report of August 23, 1877 (Tr. 73) was that he "decided *to recommend*" that a tract of land be set apart. The Commissioner of Indian Affairs, in transmitting his report to the Secretary, concurs in his "recommendations" and "would like to see *the proposed plan* adopted with the least delay possible." (Tr. 79.) The Secretary of the Interior, in transmitting the correspondence to the Senate (see letter of January 23, 1878, printed in 208 Fed. at p. 473) describes the Commissioner's letter as "*recommending* the adoption in part of the *plan* of the Inspector"; and he suggests "such appropriate legislation by Congress as will enable the Department to carry it into effect." Again, it is apparent from the order of General Howard of September 3, 1880, that the Indians themselves were aware that Watkins had closed no agreement with them for they are described (Tr. 82) as "expecting the executive order in their case." And finally, as pointed out by the trial court in the Mitchell case (208 Fed. 473), General Howard's order "shows very plainly on its face that it was a temporary emergency order, made by him on his own responsibility, by virtue of his authority as an army officer, to maintain peace among the Indians."

The doctrine of the trial court that while the action of Watkins and Howard was not sufficient to create a reservation, it was yet sufficient to create a claim, gives to the term "claim" as used in railroad grants a meaning never heretofore given to it. That term is never taken to mean a mere asserted right, however strong may be the moral grounds on which the assertion rests. To be such a "claim" as will except lands from a grant it must have a

definite and authentic legal status. The rights of homesteaders, for instance, may be initiated by settlement and occupancy; but if, at definite location, the settler, with an opportunity to make his entry, has not done so the railroad title attaches notwithstanding his "claim." In *Northern Pacific Railroad v. Colburn*, 164 U. S. 383, 386, the court said:

> "If it be true, as matter of law, that mere occupation or cultivation of the premises at the time of the filing of the map of definite location, unaccompanied by any filing of a claim in the land office then or thereafter, excludes the tract from the operation of the land grant, the decision of the Supreme Court of Montana was right. But frequent decisions of this court have been to the effect that no pre-emption or homestead claim attaches to a tract until an entry in the local land office."

So, also in *Whitney v. Taylor*, 158 U. S. 85, 94, the court, speaking of pre-emption claims, said:

> "But it is also true that settlement alone without a declaratory statement creates no pre-emption right. 'Such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a pre-emptor, the rule being that his settlement alone is not sufficient for that purpose.' *Lansdale v. Daniels*, 100 U. S. 113, 116. And the acceptance of such declaratory statement and noting the same on the books of the local land office is the official recognition of the pre-emption claim."

In *Tarpey v. Madsen*, 178 U. S. 215, the court said:

> "A proper interpretation of the acts of Congress making railroad grants like the one in this case requires that the relative rights of the company and an individual entryman must be determined, not by the act of the company, in itself fixing definitely the line of its road, or by the mere occupancy of the individual, but by record evidence, on the one part the filing of

> the map in the office of the Secretary of the Interior, and, on the other, the declaration or entry in the local land office."

So in *Northern Pacific Railroad Company v. Allen*, 27 L. D. 286, the Department of the Interior, said:

> "Non-mineral land is not excepted from the grant to the Northern Pacific by reason of a 'claim' thereto under the mining laws, unless the claim is one which has been asserted before the local land office, and is pending of record there, at the time the line of the road is definitely fixed."

The court below cites and apparently relies on *Northern Pacific v. Musser-Sauntry Company*, 168 U. S. 604; *Northern Lumber Company v. O'Brien*, 204 U. S. 190; *U. S. v. Southern Pacific Company*, 146 U. S. 570; *Newhall v. Sanger*, 92 U. S. 761; and *U. S. v. Southern Pacific Company*, 76 Fed. 134. A very striking thing about these cases, in view of the court's reliance upon them, is that no one of them is concerned with the question of *exceptions* from a railroad grant. Each of them deals only with the question whether the lands under consideration in the particular case were, *at the date of the grant*, lands of the character granted.

In the *O'Brien case* the question was whether lands withdrawn in May, 1864, as being within the prescribed limits of the general route of the Lake Superior & Mississippi Company, were public lands so as to pass to the Northern Pacific Company under its grant of July 2, 1864, and it was held that they were not.

In the *Musser-Sauntry* case it was held that, because of the withdrawal from sale of lands under a grant of which the Chicago, St. Paul, Minneapolis & Omaha Railway

Company was the beneficiary, they were not public lands so as to pass to the Northern Pacific Company by its grant of July 2, 1864.

In the *Southern Pacific case* it was held that lands within the place limits of the grant of July 27, 1866, to the Atlantic & Pacific Railroad Company were not public lands so as to pass to the Southern Pacific Company under a later grant of March 3, 1871.

In *Newhall v. Sanger* it was held that lands, which, at the date of the grant were claimed to be part of a Mexican grant at that time *sub judice* were not public lands so as to pass to the railroad company under the grant.

A similar proposition was involved in *U. S. v. Southern Pacific Company,* 76 Fed. 134, where it was held that because at the date of the grant the lands in question had been applied for by the State of California and so "were taken out of the category of public lands within the meaning of the railroad grant."

This distinction between cases dealing with what was granted, and cases dealing with what was excepted from a grant is by no means unimportant here. Two things are necessary to a valid title under the grant to the Northern Pacific Company: (1) That at the date of the grant the lands shall have been lands of the character granted (i. e., public lands), and (2) that being lands which at the date of the grant were of the character granted, they shall not, between that date and the date of definite location, have fallen into any of the excepted classes. The question what the grant covered at its date is one thing. The question what was thereafter excepted from it is another thing.

Now the cases cited and relied upon by the court below deal only with the question what was embraced within the grant at its date, and that question is not involved here in the slightest degree. Beyond all controversy, these lands, on July 2, 1864, were public lands. True they were a part of the Indian country referred to in the second section of the Act; but the fee was in the United States and the grant passed title to them. It is certain that if the map of definite location had been filed at any time previous to 1877, the Northern Pacific Company would have taken title to them, and as we have said, if title is not now in the Railway Company, it can be only because after the date of the grant and before filing of map of definite location, two subordinate officers of the Government, whose acts are described by the trial court in the Mitchell case as "ineffectual for any purpose," entered into negotiations with the Indians concerning them.

The trial court, speaking of General Howard's order, says (Tr. 33) that it was promulgated *"with the concurrence and approval of the Secretary of War and the Secretary of the Interior."* If this statement were true, it would indeed change the aspect of the case; but we think it certain that the court is mistaken here. There is not in the record a word to suggest, nor has any one heretofore suggested, that either the Secretary of War or the Secretary of the Interior concurred in or approved of General Howard's order. There is not, indeed, a word to suggest that the Secretary of the Interior *even knew* of it, to say nothing of concurring in or approving of it. It appears that on August 31, 1880, three days before the date of the order, General Howard telegraphed the Adjutant General at Washington to get "authority from the

President or Secretary of the Interior to declare a straight (strip?) eight miles broad *temporarily* withdrawn from settlement." (Tr. 80.) This telegram the Chief Clerk for the Secretary of War transmitted to the Secretary of the Interior on September 1, 1880, without any recommendation. (Tr. 80.) All that we know as to what was done by the Secretary of the Interior on receipt of this telegram is what we gather from a letter addressed to him by the Secretary of War on January 15, 1881, more than three months after map of definite location was filed. (Tr. 82.) We quote this letter in full:

> "January 15, '81.
>
> Sir: I have the honor to acknowledge the receipt of your letter dated the 7th of September, last, enclosing one from the Commissioner of Indian Affairs, in reply to letter from this Department transmitting copy of telegram from General Howard, dated Spokane Falls, W. T., August 31st, last, in which he states that 'White settlements are beginning on unsurveyed lands claimed by Spokane Indians between Chamakine Creek and the Columbia along Spokane River,' and asking authority from the President to declare a *straight* eight miles broad temporarily withdrawn from settlement.
>
> In reply to your request that General Howard be instructed to forward a description by natural objects of the tract of country which he desires reserved for the protection of said Indians, I beg to enclose herewith a description and plat of the lands referred to.
>
> Very respectfully,
>
> Your obedient servant,
>
> ALEX. RAMSEY,
>
> Secretary of War.
>
> The Honorable, The Secretary of the Interior."

This is every word which the record contains on the subject. Does this suggest that General Howard's order was promulgated with the concurrence or approval of the

Secretary of War or of the Secretary of the Interior? Does not, on the contrary, make it very plain that it was not, and that the Secretary of the Interior did not even know that such an order had been made? On September 7, four days after the order was promulgated, the Secretary of the Interior was asking for a description of the tract which General Howard "desires reserved"; and this information the Secretary of War does not give to him until more than four months thereafter. How can it be said in the face of these facts that the Secretary of the Interior or the Secretary of War gave their concurrence or approval to the order?

The trial court says:

> "It is idle now to enquire whether these officers had technical authority under the law to establish a reservation. The parties were not dealing on an equal footing. A powerful Government was treating with an inferior race and to repudiate the claim of the Indians at this late day because of the technical rules of law, of which the Indians were totally ignorant, would be an act of perfidy such as the Government has never been guilty of in all its dealings with the numerous tribes of Indians within its borders."

With the most sincere respect and deference, we submit that this language ignores altogether the very point at issue, namely, the question of intervening rights. We are not considering what moral obligation may rest upon the Government as the result of Watkins' negotiations, but whether as matter of law any rights were initiated by them —whether, as matter of law, they were "effectual for any purpose." The trial court has said that they were not, and this court must go far beyond the doctrine of the *Midwest Oil case* before it can be affirmed that they were. As they were not, the rights of the railroad company at-

tached to the lands on October 4, 1880. Putting the case for the Indians on the most favorable ground, there were outstanding on that day two obligations on the part of the Government, one a moral obligation, having no legal standing because created only by those who were without authority to create it; and the other the obligation to the railroad company contained in the grant of July 2, 1864. No rights or claims to specific lands, in favor of either of the obligees could come into existence until the Executive had acted in the one case or until map of definite location had been filed in the other. The map of definite location was filed before the Executive acted, and, therefore, the rights of the railroad company attached. To say that under such circumstances we are to disregard "the technical rules of law" by which they attached, is to say that faith is to be kept with one obligee by breaking faith with the other.

That it would be wrong, that it would even be an "act of perfidy" for the Government not to give to the Indians the full equivalent of what they expected to get may be conceded. Certainly it is not necessary to our case to deny it. But why are we to suppose that the Government will be guilty of this act of perfidy? The Indians went upon the land which they agreed to accept and remained there unmolested for more than thirty years. The lands were then surveyed and Congress provided that they should be allotted to individuals or converted into cash. When surveyed, the railroad company, for the first time, asserted its rights to the odd-numbered sections in that portion of the reservation which lay within place limits. If by the technical rules of law those rights are valid, it is the duty of the court to recognize them. The Government

stands before the court precisely as any other litigant stands before it. It is no part of the court's duty to deny to one litigant rights given to it by the rules of law upon the ground that a breach of faith might thereby result to the other, even if there were real ground for the apprehension of such a breach. But there is none. As a part of its contract with the Northern Pacific Railroad Company, Congress, in the second section of the act, agreed to extinguish the Indian title to all lands falling under the operation of the act. It now appears that a part of the consideration which the Indians had expected to receive for the extinction of this title has failed. This situation is not unusual. Similar situations arise frequently, and there is not the slightest reason to suppose that Congress will not do in this case what it has frequently done in other cases, namely, by a cash equivalent or in some other way make good the loss which the Indians would otherwise suffer.

CHARLES W. BUNN,
CHARLES DONNELLY.

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In the Supreme Court of the United States.

OCTOBER TERM, 1917.

NORTHERN PACIFIC RAILWAY COMPANY, plaintiff in error,
v.
EMMA A. WISMER, SUBSTITUTED FOR George F. Wismer, deceased.

No. 152.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT.

The writ of error of the Northern Pacific Railway Company (R. 112) brings up for review a judgment of the Circuit Court of Appeals for the Ninth Circuit (R. 130) affirming a judgment of the District Court for the Eastern District of Washington, Northern Division (R. 41), which dismissed the Company's action to recover 80 acres of land in the Spokane Indian Reservation.

Opinions: C. C. A. (R. 124), 230 Fed. 591; D. C. (R. 29).

The action, originally brought in a state court, was transferred to the Federal court (R. 9), a jury was waived (R. 28) and the case was decided upon an agreed statement of facts (R. 50).

The Company claims under the Act of July 2, 1864 (13 Stat. 365, 367, § 3), which granted to its predecessor, the Northern Pacific Railroad Company, to aid in the construction of a railroad line to the Pacific coast—

> every alternate section of *public land*, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have *full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights*, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been *granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of*, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections.

The tract in controversy is nonmineral, part of an odd-numbered section, and within the place limits of this grant, according to the plat of definite location filed October 4, 1880 (R. 51–52).

The defendant claims under a patent of the United States issued April 9, 1913, upon application filed April 2, 1910 (R. 60), pursuant to the Act of May 29, 1908 (35 Stat. 458), which provided for allotments on the Spokane Indian Reservation and disposal of the surplus agricultural lands for the credit of the Indians (§§ 1, 2, 3), the Government to "act as trustee for said Indians to dispose of the said lands and to expend and pay over the proceeds received from the sale thereof" (§ 7).

This Indian reservation was established by an order of the President issued January 18, 1881, as follows (R. 60):

> It is hereby ordered that the following tract of land situated in Washington Territory be, and the same is hereby, set aside and reserved for the use and occupancy of the Spokane Indians, namely:
>
> Commencing at a point where the Chemakane Creek crosses the forty-eighth parallel of latitude; thence down the east bank of said creek to where it enters the Spokane River; thence across said Spokane River westwardly along the southern bank thereof to a point where it enters the Columbia River; thence across the Columbia River northwardly along its western bank to a point where said river crosses the said forty-eighth parallel of latitude, thence east along said parallel to the place of beginning.

The reservation so established had its inception in a previous agreement "between the Spokane Tribe of Indians, Colonel E. C. Watkins, who was then and

there an Indian Inspector representing the Department of the Interior, acting in his official capacity, General Frank Wheaton and Captain M. C. Wilkinson, of the United States Army, representing the War Department" (R. 55). This agreement, signed August 18, 1877, reads as follows (R. 56):

> We, the undersigned Chiefs and head men of the Spokane Tribe of Indians for ourselves and our people hereby agree to accept the following described land for our reservation: Beginning at the source of the Chimokan Creek in Washington Territory, thence down said creek to the Spokane River, thence down said River to the Columbia River, thence up the Columbia River to the mouth of Nimchin Creek, thence easterly to the place of beginning.
>
> And we do further agree to go upon the same by the first of November next with the view of establishing our permanent homes thereon and engaging in agricultural pursuits. We hereby renew our friendly relations with the whites and promise to remain at peace with the Government and abide by all laws of the same, and obey the orders of the Indian Bureau and the officers acting thereunder.

The agreed statement of facts, after setting out the Indian agreement as above, shows (R. 57–58):

> That thereafter, and prior to November 14, 1877, and pursuant to the agreement aforesaid, the said E. C. Watkins, Indian Inspector, as aforesaid, acting in his official capacity, located such of the said Spokane Indians as were not already resident thereon upon said reservation

above described, and said Spokane Indians remained upon and continued in use, occupancy, possession and enjoyment of said tract described in said agreement and claimed the same as their reservation continuously thereafter until the year 1910.

That the action of the said E. C. Watkins in locating said Indians upon said reservation was by him reported to the Commissioner of Indian Affairs on November 14, 1877, and said report was, on January 23d, 1878, in response to a resolution, communicated by the Secretary of the Interior to the United States Senate, and by the Senate referred to the Committee on Indian Affairs and ordered printed.

For the protection of the Indians against the encroachment of settlers, pending the issuance of an executive order, the following field order was issued by Brigadier General Howard, commanding the Department of the Columbia, on September 3, 1880 (R. 58):

Whereas, in consequence of a promise made in August, 1877, by E. C. Watkins, Inspector of the Interior Department, to set apart or have set apart, for the use of the Spokane Indians, the following described territory, to wit: Commencing at the mouth of the Cham-a-kane Creek, thence north eight miles in the direction of said creek; thence due west to the Columbia River; thence along the Columbia and Spokane Rivers to the point of beginning—the Indians are still expecting the Executive order in their case, and are much disturbed by the attempts

> of squatters to locate land within said limits, it is hereby directed that the above described territory, being still unsurveyed, be protected against settlement by others than said Indians, until the survey shall be made, or until further instructions. This order is based upon plain necessity to preserve the peace until the pledge of the Government shall be fulfilled, or other arrangements accomplished.
>
> The commanding officers of Forts Cœur d'Alene and Colville and Camp Chelan are charged with the proper execution of this order.

The situation of these Indians at and prior to the agreement of August 18, 1877, is shown by the agreed statement as follows (R. 54):

> That prior to August 16, 1877, bands of Indians roved about and upon said lands and used the said country for hunting and fishing and so occupied the same as they did a considerable scope of country including the unoccupied and unsurveyed territory now comprising Eastern Washington; that said Indians had not ceded any right or interest in and to any part thereof, if they had, to the Government of the United States.
>
> That in June, 1877, certain Indian bands and tribes of the northwest country had commenced hostilities against, and were engaged in killing, wounding, and outraging white settlers and destroying their property, and that during said time and for five or six years thereafter, said Indians continued to menace the white population living in Eastern Washing-

ton, Oregon, and Northern Idaho, and the military forces of the United States Government and said hostile Indians were engaged in actual warfare.

That the said Indians so engaged in war with the United States during said time sought to induce other Indians at peace with the Government to engage in hostilities with them.

That among the peaceful Indians, which those at war were endeavoring to have join them, were many residing on the lands afterwards set aside as the Spokane Indian Reservation, which reservation includes the lands in the complaint.

The lands along the railroad line were surveyed in 1887, and thereafter the Company "used and dealt with the lands within said grant, except the odd sections claimed by it in the Spokane Indian Reservation, which said odd sections were occupied by the Indians the same as other lands in said reservation" (R. 52). It appears from the Company's brief that "The reservation itself was surveyed in 1906" (p. 6), and that the Company asserted its right to the odd sections in question after the Act of May 29, 1908 (p. 7). This asserted claim covered 64,000 acres, and was denied by the Commissioner of the General Land Office February 15, 1910. This decision was affirmed by the Secretary of the Interior March 7, 1910 (R. 61), and reaffirmed on review March 17, 1910 (38 L. D. 496).

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THE QUESTIONS PRESENTED.

The Company specifies in its brief but one "assignment of error" as follows (p. 9):

> The Court erred in holding that the Indians had a special claim to the lands in question at the time of definite location of the railroad.

This alleged error goes only to one of several reasons stated in the opinion; it does not reach the judgment. But as the court, at its option, may notice a plain error not specified (Rule 21, par. 4), we shall assume the burden of showing a want of error in the judgment.

The railroad grant of July 2, 1864 (13 Stat. 365, 367, § 3), did not attach to land in the Spokane Indian Reservation unless, on October 4, 1880, when the line of road was definitely fixed, it was "public land" of which the United States had "full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights."

We contend: (1) that the Spokane Indian Reservation had its inception in the agreement of August 18, 1877, but if not; (2) that the railroad grant was subject to the prior "claims or rights" of the Indians at the time of the railroad location.

ARGUMENT.

I.

The Spokane Indian Reservation had its Inception in the Agreement of August 18, 1877, more than Three Years before the Railroad Location.

While conceding that the executive order of January 18, 1881, would have been effectual to reserve or appropriate the tract in controversy but for the prior railroad location on October 4, 1880, it is contended for the Company that the agreement of August 18, 1877, was ineffectual for any purpose because the Government officers who made and carried it out acted without authority in the first place. But it is stipulated in the record that the agreement of 1877 was made by Inspector Watkins, "representing the Department of the Interior," and General Wheaton and Captain Wilkinson, "representing the War Department" (R. 55). These officers were not merely assuming to represent these two Departments; they were "representing" the Departments. In other words it is stipulated that the Interior Department and the War Department, represented by their respective officials, set aside this reservation for the Indians on August 18, 1877.

For what purpose were the two Departments acting? Again it is stipulated: "for the purpose of collecting the said Indians belonging to the said tribe on a reservation, there to engage in agricultural pursuits and establish permanent homes, and to extinguish the general Indian title of any of said Indians to all other lands not within the said reser-

vation, and as a means of influencing said Indians to continue in friendly relations with the whites, to remain at peace with the Government of the United States, and abide by all laws of the same" (R. 56). For purposes such as these certainly the Departments of the Government were well represented.

The agreement itself was well adapted to accomplish its purposes. The Indians agreed to "accept" the lands described in it for their "reservation." They agreed to go upon this reservation by the first of the following November with the view of establishing "permanent homes thereon and engaging in agricultural pursuits." They renewed friendly relations with the whites, and promised "to remain at peace with the Government of the United States and abide by all laws of the same, and obey the orders of the Indian Bureau and the officers acting thereunder" (R. 56). The Indians complied with their agreement in every particular, and the Government has endeavored in every reasonable way to fulfill its obligation. Pending the issuance of a formal executive order by the President and "for the purpose of carrying out the terms of the agreement," as it is stipulated, military force was used to protect them against the aggression of white settlers (R. 58). At an early opportunity the executive order was issued (R. 60). Meanwhile the agreement was reported to Congress by the Secretary of the Interior and was there ordered to be printed as a public document (R. 58). Subsequently Congress provided for surveying the lands (32 Stat. 575; 34 Stat. 654), for

allotments in severalty to the Indians (32 Stat. 744; 35 Stat. 19), and for disposition of surplus lands and timber for their benefit (35 Stat. 458, 813).

In 1877 in the vicinity of this reservation the military forces of the United States were engaged in actual warfare with hostile Indians, who were seeking to induce others at peace with the whites to join them. Among the peaceful Indians whom the hostile ones were endeavoring to influence were these Spokanes, many of whom were residing on the lands which were set apart for them by the agreement of August 18, 1877 (R. 55, 64-67, 91-93). The occasion demanded prompt and appropriate action by responsible field officers of the Government, and such action was taken. To say that these officials exceeded their authority is to deny that they had any authority, and this is to deny that they were representing the two departments concerned, as it is stipulated they were.

It is no objection to say that these officers acted without authority because they were subordinates. Most of the government business requiring executive action is necessarily done through the heads of departments and by their subordinates; and when the acts of subordinate officials within the scope of the supreme executive authority are not set aside, but are acted upon or confirmed, such acts are to be taken in law as the acts of the President. A different rule would "render the Government an absolutely impracticable machine." *Williams* v. *United States*, 1 How. 290, 297; 7 Op. Atty. Gen. 453, 480.

In *Wilcox* v. *Jackson*, 13 Pet. 496, the Commissioner of the General Land Office, at the request of the Secretary of War, directed a certain section to be reserved for a military post and Indian agency, and the post and agency having been subsequently established, the act of the commissioner in directing the reservation was considered as the act of the President. The court said (p. 512):

> The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the War Department. Hence, we consider the act of the War Department, in requiring this reservation to be made, as being in legal contemplation the act of the President; and consequently, that the reservation thus made was, in legal effect, a reservation made by order of the President, within the terms of the act of Congress.

In *Wolsey* v. *Chapman*, 101 U. S. 755, 759, 768–770, the Commissioner of the General Land Office, in consequence of an opinion rendered by the Secretary of the Treasury as to the extent of a public land grant, had directed the registers and receivers of the local land office to withhold from sale all the odd-numbered sections within certain limits, and it was held that this order of the Commissioner, made effective by the local land officers, was the legal equivalent of a proclamation issued by the President—following *Wilcox* v. *Jackson*, *supra*.

In *Dornelly* v. *United States*, 228 U. S. 243, 257, an instance is given of a recognition by Congress of the existence of an Indian Reservation while yet no formal executive order fixing its boundaries had been issued and while its status as a reservation rested on a mere public notice given by the local Indian Superintendent under instructions from the Interior Department.

It is suggested by counsel for the Company that the decision in *United States* v. *Midwest Oil Co.*, 236 U. S. 459, limited this rule of executive representation to the heads of departments. This is a misapprehension. Reference is made in the majority opinion to a large number of withdrawal orders made by subordinate officers as illustrating the exercise of executive power to make the withdrawal in question, and specifically to this power "long exercised by the Commissioner of the General Land Office" (p. 480). The minority opinion went upon the ground that the particular order under consideration was beyond the scope of any executive authority.

The setting apart of this reservation in 1877 was not final. It was subject to revision by the Secretary of the Interior and by the President, as are all acts of their subordinates. But it was subsequently confirmed by the President's order and this established its validity from the beginning. In *Chicago, M. & St. P. Ry. Co.* v. *United States*, 244 U. S. 351, 353, 357, the Commissioner of the General Land Office, acting by direction of the Secretary of the Interior,

temporarily withdrew from disposal a large body of land "with a view to the creation of a permanent forest reserve," and it was held that a subsequent railroad location, although prior to the President's proclamation establishing the permanent reserve, was subject to the preliminary withdrawal.

The main reliance of counsel for the Company is the case of *United States* v. *Tichenor*, 12 Fed. 415. It was there held that the act of an army lieutenant, by direction of his general officer, in occupying a tract of land in Oregon for a military camp did not constitute a reservation of the land from disposal as public land. But the circumstances of that case were very different from the case at bar. There was no showing that the action was taken under instructions from the War Department, or that there was any intention to create a permanent reservation, or that the land was ever designated or marked on any map as a reservation, or recognized as such by the President or by Congress (p. 423). "Its occupation was a mere incident of the temporary presence of a small detachment of soldiers in that region during the settlement of Indian difficulties" (p. 424).

Northern Pac. Ry. Co. v. *Mitchell*, 208 Fed. 469, is also relied on. In that case Judge Rudkin, who decided against the Company in the present case, held that the Spokane Indian Reservation was not created until the issuance of the President's order of January 18, 1881, and that therefore the lands were not reserved when this railroad was definitely located on

October 4, 1880. But, as pointed out by Judge Rudkin in the present case, the defendant in the *Mitchell* case only "claimed that the lands were reserved by reason of the report of the Indian Inspector and the order of General Howard" (R. 38). The agreement of August 18, 1877, apparently was not before the court in the *Mitchell* case. Certainly it was not considered in the opinion. Upon the facts in this record, Judge Rudkin said (R. 37):

> The lands had been set apart for the use of the Indians by both the civil and military authorities of the Government; the officers of the Government represented to the Indians that they came among them for the purpose of establishing a reservation, armed with authority from the Secretary of the Interior and the President of the United States; the Indians relied upon these representations, moved onto the reservation, established homes there, and relinquished their more general claim to other public lands in the vicinity. After all this had transpired the Government was bound, in equity and good conscience, to recognize the claim of the Indians and confirm the acts of its officers, and did so at an early opportunity by public proclamation of the President. It is idle now to inquire whether these officers had technical authority under the law to establish a reservation.

II.

The Railroad Grant was subject to the Prior Claims or Rights of the Indians at the Time of the Railroad Location.

Regardless of whether this reservation was technically established before or after the railroad location, none of the lands within it were granted to the Railroad Company unless, at the time of the location they were "public lands" of which the United States had "full title" free from all "claims or rights."

It is clear that the Spokane Indians had claims and rights which attached to these lands even prior to the agreement of 1877. Surrounded by hostile bands with whom the Government was at war, these Indians were yet peaceful. Many of them had made permanent settlements on these lands. They had houses and enclosures and were cultivating considerable areas. One of them had a good farm of about 80 acres, with a log dwelling and barn, a good eastern-made wagon and milk cows. Another had still more land under fence, maintained an irrigating ditch and prided himself on his vegetables. At various places the Indians had small farms or gardens of three or four acres each. At one place they had between 200 or 300 acres enclosed, with about 150 acres cultivated. Within another inclosure of nearly 800 acres they had separate farms in cultivation to the extent of about 200 acres. This condition, beginning prior to 1877, existed in 1879 (R. 55, 64–67, 91–93). Those of the Indians who were not already

settled on these lands at the time of their agreement with Indian Inspector Watkins and the army officers on August 18, 1877, were located there by the Inspector prior to November 14, 1877. From that time forth the Indians "remained upon and continued in use, occupancy, possession and enjoyment of said tract described in said agreement and claimed the same as their reservation" (R. 57). In this they were protected by the military arm of the Government, pending the issuance of the President's proclamation, against encroachments by settlers (R. 58). The matter was reported to Congress (R. 58), the President's order was issued in due course (R. 60), and at all times the claims of these Indians to the lands in question have been recognized by the Executive and by Congress. The other lands along the railroad were surveyed in 1887, but the reservation itself was not surveyed until 1906 (Company's brief, p. 6). The Company also appears to have acquiesced, for, although it used and dealt with the adjoining granted lands upon their survey in 1887, it took no steps to interfere with the Indian occupancy at any time (R. 52). After the Act of May 29, 1908, apparently for the first time (Company's brief, p. 7), the Company asserted its claim in the General Land Office to all the odd numbered sections within the place limits of its grant on the reservation, and its claim was promptly denied (R. 61; 38 L. D. 496). Thereupon the Company brought numerous actions in ejectment against purchasers of the surplus Indian lands holding patents under

the Act of 1908, the present case being one of them (Company's brief, p. 7).

This court is now asked to reverse the decisions of two lower courts and to hold that, although the Indians had established their permanent homes on these lands under the Government's active protection long prior to the railroad location, nevertheless the Indians thereby acquired no "claims or rights." The court is asked, after long acquiescence by the Company, to repudiate everything that Congress and the Executive have done for forty years in plain recognition and confirmation of such claims or rights. In the language of Judge Rudkin, the court is asked to commit "an act of perfidy such as the Government has never been guilty of in all its dealings with the numerous tribes of Indians within its borders" (R. 38). And for this the case of *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55, is cited.

As we read the *Buttz* case, the principle there applied with respect to Indian rights is the reverse of that claimed by counsel, and really goes much farther than the facts of this case require to sustain the rights of these Indians. Under the same grant, and involving a railroad location through similar "Indian country," the court there held that the grant took effect subject to the right of Indian occupancy which had not been extinguished. This right was subsequently extinguished, and it was held that the Company then took an indefeasible title. But in the present case, leaving out of view the permanent homes established by the Spokane Indians and considering

only their original right of occupancy to the lands in question, this right has not been extinguished. On the contrary, as to this small reservation, the lands have been appropriated for their benefit. In doing this—assuming that it was done subsequently to the railroad location—the Government but exercised a right reserved in the grant, and its action was largely beneficial to the Company, since thereby was extinguished the Indian right to other large areas. The grant provided for extinguishment of this Indian right of occupancy "as rapidly as may be consistent with public policy and the welfare of the Indians" (13 Stat. 367, §2), and, as the court said in the *Buttz* case, "the manner, time, and conditions of its extinguishment were matters solely for the consideration of the Government, and are not open to contestation in the judicial tribunals" (119 U. S. 66).

Applying this principle, it has been held that a title granted subject to a prior right of Indian occupancy is terminated by a subsequent disposition by the Government in the course of its dealings with the Indians. *United States* v. *Thomas*, 151 U. S. 577, 584; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 393–401; *Wisconsin* v. *Hitchcock*, 201 U. S. 202, 212.

Counsel contend that such a disposition would be a breach of faith because, it is said (brief, p. 21):

> As a part of its contract with the Northern Pacific Railroad Company, Congress, in the second section of the act, agreed to extinguish the Indian title to all lands falling under the operation of the act.

A similar contention was made in *Atlantic and Pacific Railroad* v. *Mingus*, 165 U. S. 413, 438, and the court, after stating the effect of the decision in the *Buttz* case, said (p. 439):

> We consider this construction of the compact unsound. The railroad company took its chances with the Government in this particular. The latter might not deem it sound policy or for the welfare of the Indians to extinguish their title, or it might not procure their assent.

To similar effect see *M. K. & T. Ry.* v. *United States*, 235 U. S. 37, 39.

But we need not rely on this principle, which relates only to the original right of Indian occupancy. Here the Indians had other and more substantial claims, founded upon their permanent settlements and the agreement of 1877. It is stipulated in the record that, "pursuant to the agreement aforesaid," the Spokane Indians, since "prior to November 14, 1877," have used, occupied, possessed and enjoyed these lands, "and claimed the same as their reservation" (R. 57). Yet it is said the Indians had no "claim" to the lands when the railroad was located October 4, 1880. This is so it is said because the word "claim" in the sense of the excepting clause of the railroad grant means a claim that has "a definite and authentic legal status." If by this is meant that the claim to be effective must be "valid" or "lawful," it is enough to say that the decisions establish the contrary. *Newhall* v. *Sanger*, 92 U. S. 761, 765;

Whitney v. *Taylor*, 158 U. S. 85, 93; *Northern Pac. Railroad* v. *Musser-Sauntry Co.*, 168 U. S. 604, 608–609. If it is meant that the claim must appear on some proper public record, a sufficient answer is that the stipulation here shows that this Indian claim became a matter of record in the Indian Office in 1877, was reported to Congress by the Secretary of the Interior in 1878, and was there printed as a public document (R. 57–58, 86). It is settled, however, that the claim to be effective need not be "of record," but may rest on possession and occupancy, provided the claimant be not a mere trespasser. *Northern Pacific Railway* v. *Trodick*, 221 U. S. 208, 218.

CONCLUSION.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

FRANCIS J. KEARFUL,
Assistant Attorney General.

JANUARY, 1918.

NORTHERN PACIFIC RAILWAY COMPANY *v.* WISMER, SUBSTITUTED FOR WISMER.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 152. Argued January 28, 29, 1918.—Decided March 4, 1918.

Lands opposite the line of the Northern Pacific Railroad Company constituting an Indian reservation when the line was definitely located, were not embraced in the grant of odd numbered sections made to the company by the Act of July 2, 1864, c. 217, 13 Stat. 365.

A reservation of public lands for and exclusively devoted to the occupancy of a tribe of Indians, made under the direction and with the approval of the Commissioner of Indian Affairs, and expressly or tacitly approved by the Secretary of the Interior, *held* valid and effectual to exclude the lands from the Northern Pacific grant, although not formally sanctioned by the President until after the railroad had filed its plat of definite location.

230 Fed. Rep. 591, affirmed.

THE case is stated in the opinion.

Mr. Charles Donnelly, with whom *Mr. Charles W. Bunn* was on the brief, for plaintiff in error.

Mr. Assistant Attorney General Kearful for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

This suit is one in ejectment by the Northern Pacific Railway Company to recover possession of eighty acres of land (the title to 64,000 acres depends upon the decision), and it is here on writ of error to review the judgment of the Circuit Court of Appeals, affirming that of the District Court in favor of the defendant.

The principles of law applicable to the case are few and well settled and the decision of it depends upon the interpretation to be given to stipulated facts.

The plaintiff in error is the successor in interest to the Northern Pacific Railroad Company, and the defendant in error, substituted for the deceased defendant, George F. Wismer, claims to own the land in controversy by virtue of a homestead entry made in 1910, upon which a patent was issued in 1913.

By act of Congress dated July 2, 1864, 13 Stat. 365, there was granted to the Northern Pacific Railroad Company, for the purpose of aiding in the construction of its line to the Pacific Coast, twenty alternate odd-numbered sections of land per mile on each side of the railroad line, which it should locate and adopt, within the boundaries of any Territory and ten alternate odd-numbered sections per mile on each side of the railroad line, which it should adopt, within the boundaries of any State. The grant embraces only lands to which, "the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preëmption, or other claims or rights, at the time the line of said road is definitely fixed."

On October 4, 1880, the Railroad Company definitely located the position of its line opposite the land in controversy and filed a plat thereof, as required by law, and it is claimed that upon the filing of this plat the company became entitled to the lands granted, including those of the defendant in error, as of July 2, 1864, the date of the granting act of Congress.

The claim of the defendant in error, which prevailed in each of the lower courts, is that the land in controversy was reserved or otherwise appropriated, within the meaning of the terms of the grant to the Railroad Company of 1864, quoted above, at the time this part of the line of the railroad was definitely located, for the reason that it was then within an Indian Reservation, or was subject to an

Indian claim, which prevented the grant attaching to it, by virtue of the following facts, which we condense from the stipulation between the parties.

Prior to August 16, 1877, bands of Indians of the Spokane and other tribes occupied, for hunting and fishing, the extensive territory now comprising the eastern part of the State of Washington, in which they had not then ceded to the United States any part of their rights. In the spring of that year certain of these Indian tribes commenced hostilities against the white settlers which resulted in war with the United States, in which they were urging the Spokane tribe, then at peace, to join.

On May 7, 1877, the Commissioner of Indian Affairs directed Col. E. C. Watkins, an Indian Inspector, in charge of all agencies in Washington Territory, to give his "special attention" to the subject of gathering the roving Indians "upon permanent reservations," with the result that on August 16, 17, 18, 1877, a Council was held at Spokane Falls, Washington, between the Chiefs and Headmen of the Spokane tribe of Indians and Colonel Watkins, acting "in his official capacity as Indian Inspector, representing the Department of the Interior," and General Frank Wheaton, and Captain M. C. Wilkinson, of the United States Army, representing the Department of War.

It is expressly stipulated "that for the purpose of collecting the said Indians belonging to the said tribe (the Spokane tribe) on a reservation," and of inducing them: to establish homes and to engage in agricultural pursuits; to extinguish their title "to all other lands not within the said reservation" and to remain at peace with the United States, the agreement following was signed by the representatives of the Government of the United States and the Chiefs and Headmen of the tribe who attended the Council, viz:

"In Council at Spokane Falls, W. T. August 18th, 1877.

"We, the undersigned Chiefs and head men of the Spokane Tribe of Indians for ourselves and our people hereby agree to accept the following described land for our reservation: Beginning at the source of the Chimokan Creek in Washington Territory, thence down said creek to the Spokane River, thence down said River to the Columbia River, thence up the Columbia River to the mouth of Nimchin Creek, thence easterly to the place of beginning.

"And we do further agree to go upon the same by the first of November next with a view of establishing our permanent homes thereon and engaging in agricultural pursuits. We hereby renew our friendly relations with the whites and promise to remain at peace with the Government and abide by all laws of the same, and obey the orders of the Indian Bureau and the officers acting thereunder."

On August 23 Col. Watkins reported the result of the Council to his superior officer, the Commissioner of Indian Affairs, and sent him a copy of the executed agreement, with his recommendation that the territory described therein should be set apart and reserved for the Spokane tribe.

Immediately after the signing of this agreement and prior to November 14th of the same year, Col. Watkins, still "acting in his official capacity, located such of the said Spokane Indians as were not already residing thereon upon said *reservation*" described in the agreement, and on November 26, 1877, he reported this action to his superior, the Commissioner of Indian Affairs, who communicated it to the Secretary of the Interior, with his approval, on December 29, 1877, who, in turn, communicated it to the United States Senate on January 23, 1878.

The Indians remained at peace with the United States and continued in the use and occupancy of the lands described in the agreement and claimed the same "as their reservation" until the year 1910.

The encroachment of squatters upon the land thus reserved resulted in an order by Brigadier General Howard on September 3, 1880, directing that the military force under his command should protect the territory described in the agreement of August, 1877, against settlement by others than the Spokane Indians until survey of the land should be made or until further instructions.

On January 18, 1881, President Hayes, by Executive Order, formally set aside and reserved the territory described in the agreement of August, 1877, for the use and occupancy of the Spokane Indians.

The Indians occupied the reservation until after the Act of May 29, 1908, was passed (35 Stat. 458) directing that the Secretary of the Interior should cause allotments to be made, under the allotment laws, to all Indians having tribal rights and belonging to the Spokane Indian Reservation who had not theretofore received allotments, and providing that the surplus agricultural lands should be opened for settlement and entry under the homestead laws, and that the net proceeds derived from the sale of such lands should be deposited in the United States Treasury to the credit of the Indians of the Spokane Reservation. It was under the provisions of this act that the decedent of the defendant in error obtained his patent.

This summary of the stipulated facts points to the inevitable decision of the case.

The Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, was charged with the management of all Indian affairs and matters arising out of Indian relations (Rev. Stats., §§ 441, 463, 2058, 2149), and clearly he commissioned Col. Watkins in advance to treat with the Spokane tribe for the setting apart to them of a permanent reservation through an agreement such as that of August, 1877. The plaintiff in error concedes, as it must, that if the Secretary of the Interior approved the action taken by Colonel Watkins prior to the filing

of the plat of its line on October 4, 1880, the reservation must be considered as lawfully established and the lands thereby removed beyond the scope of the grant to the Railroad Company. (*Wilcox* v. *Jackson*, 13 Pet. 498, 512; *Wolsey* v. *Chapman*, 101 U. S. 755, 769; *Wood* v. *Beach*, 156 U. S. 548; *United States* v. *Midwest Oil Co.*, 236 U. S. 459; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States*, 244 U. S. 351, 357.) And reservations made by heads of bureaus, such as the Commissioner of the General Land Office, or the Commissioner of Indian Affairs, in the administration of the matters committed to their charge, stand upon the same footing where the Secretary of the Interior is informed of their action and where, as in this case, he either expressly or tacitly approves the same. *Spencer* v. *McDougal*, 159 U. S. 62.

Such being the law, we cannot doubt that the sound inference from the stipulated facts as we have stated them is that, with full understanding of the situation the Secretary of the Interior and the Commissioner of Indian Affairs approved the action of Colonel Watkins not later, certainly, than the sending of his report to the Senate on January 23, 1878, which was almost three years prior to the filing of the railway company's plat, and that the Executive Order of the President on January 18, 1881, simply continued and gave formal sanction to what had been done before.

That the reservation was in fact made and the lands exclusively devoted to the use of the Indians from the date of the agreement of August, 1877, is beyond controversy; that no objection was ever made by his superiors to the action taken by Colonel Watkins is equally clear, and to hold that, for want of a formal approval by the Secretary of the Interior, all of the conduct of the Government and of the Indians in making and ratifying and in good faith carrying out the agreement between them, even to the extent of protecting the reservation by mil-

itary forces from intrusion, is without effect, would be to subordinate the realities of the situation to mere form, for the delay in the issuing of the formal Executive Order of the President under the circumstances can be attributed only to the exigencies of the public business;—by his representative, the Secretary of the Interior, he had approved the setting apart of the lands to the use of the Indians almost three years before.

The judgment of the Circuit Court of Appeals will be affirmed for the reason that the Spokane Indian Reservation was lawfully created prior to the filing of the plat of the line of the plaintiff company on October 4th, 1880.

Affirmed.